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IN THE

Supreme Court of the United States

October Term, 1980
No.

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE, ET AL.,
Appellants,
-vs-
ROBERT RODGERS AND JOHNNY HAMPTON,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT STATE CIVIL CASE

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NATIONAL REPRODUCTIONS CORPORATION, DETROIT, MICHIGAN

QUESTION PRESENTED

DOES A STATE'S RULE OF PROCEDURE VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY AUTHORIZING SERVICE OF PROCESS BY PUBLICATION ALONE AS THE BASIS FOR A JUDGMENT IMPOSING PERSONAL LIABILITY UPON AN INDIVIDUAL?*

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*The parties to the proceeding in the Michigan Supreme Court were the Detroit Automobile Inter-Insurance Exchange, Willie Davis, Louis Scott and Paul Hines, appellants herein; Robert Rodgers and Johnny Hampton, appellees herein; Fanny Mae Davis, who has no interest in the outcome of this appeal; and the Michigan Secretary of State, who has no apparent interest in the outcome of this appeal.

The default judgment against Fanny Mae Davis was vacated by the Michigan Court of Appeals (22a).

The Michigan Secretary of State filed a motion to dismiss the claim against him on the grounds that the identities of both the owner and the operator of the vehicle involved were known. M.C.L. §§257.1107, .1112. Although no order of dismissal was ever entered, the failure of Plaintiffs to serve the individuals involved does not detract from the fact that they were known. Accordingly, the Michigan Secretary of State has no apparent interest in the issue herein presented.

Willie Davis, Louis Scott and Paul Hines, principal defendants below, are aligned as appellants herein because, in this appeal, their interests coincide with that of Appellant Detroit Automobile Inter-Insurance Exchange. They are inactive parties herein because they have not received notice of any of the proceedings.

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JURISDICTIONAL STATEMENT
STATE CIVIL CASE

OPINIONS BELOW

The Opinion of the Michigan Supreme Court, filed on February 3, 1981, the Opinion of the Michigan Court of Appeals, and the Opinion of the Wayne County Circuit Court are set out in the Appendix hereto. The decision of the Michigan Supreme Court is reported as *Krueger v. Williams*, 410 Mich. 144, 300 N.W.2d 910 (1981). The decisions of the lower courts are unpublished.

JURISDICTION

The decision of the Michigan Supreme Court in this case was filed on February 3, 1981 (28a-50a). It upheld against

constitutional challenge the validity of a court rule which was construed to authorize service of process by publication alone to support a personal judgment against an individual. The case was remanded to the trial court for a finding as to whether Plaintiffs had exercised due diligence in attempting to locate Defendants but were unable to serve them by other means better calculated to give actual notice. Notice of appeal to the Supreme Court of the United States was filed with the Michigan Supreme Court and the Wayne County Circuit Court on or about March 20, 1981 (51a-54a) and an Order Staying Proceedings Pending Appeal was entered on March 27, 1981 (55a-56a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2) and 28 U.S.C. §2101 (c). That such jurisdiction exists in the circumstances of this case is sustained by *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975) and *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 94 S. Ct. 407, 38 L. Ed. 2d 379 (1973).

CONSTITUTIONAL PROVISIONS AND COURT RULES

U.S. Const. amend. XIV, §1 provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Mich. Const. 1963 art. 1, §17 provides:

"No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed."

Michigan General Court Rule 105.8 provides:

"The court in which an action has been commenced may, in its discretion, allow service of process to be made upon a defendant in any other manner which is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard, if an order permitting such service is entered before service of process is made upon showing to the court that service of process cannot reasonably be made in the manner provided for under other rules."

STATEMENT OF THE CASE

Plaintiffs, Robert Rodgers and Johnny Hampton, initially filed suit against the City of Detroit, Michael De Wolfe, Detroit Police Department, Department of Street Railways, Delmar Lawrence and James M. Hare, Secretary of State of the State of Michigan, jointly and severally (Complaint). Plaintiffs alleged they they were riding as paying passengers on a D.S.R. bus, driven by Delmar Lawrence, when a Detroit Police car, driven by Michael De Wolfe and chasing a Ford Mustang, went through a stop sign at a high rate of speed and collided with the bus, causing Plaintiffs injury (Complaint, ¶2).

James M. Hare, Director of the Motor Vehicle Accident Claims Fund, was named as a party Defendant because Plain-

tiffs alleged that an unknown driver and/or owner was involved in the accident (Complaint ¶3). The Secretary of State filed a Motion for Summary Judgment of Dismissal, stating that Plaintiffs' attorney had been advised by the Motor Vehicle Accident Claims Fund that the owner of the Ford Mustang automobile was Fanny Mae Davis and that the driver at the time of the accident was Louis Scott (Motion for Summary Judgment of Dismissal, ¶3). The police report indicated that Willie Davis and Paul Hines were passengers in the Mustang at the time of the accident (Brief in Support of Motion for Summary Judgment of Dismissal).

Plaintiffs were allowed to amend their Complaint. The Amended Complaint merely added Defendants Fanny Mae Davis, Louis Scott and Paul Hines.

Plaintiffs then filed a Motion for Substituted Service based on a statement that they had made diligent but unsuccessful attempts through members of their office staff and outside investigative agencies to locate the Defendants (Motion for Substituted Service, ¶3). Plaintiffs requested that they be allowed to serve Defendants by registered mail to the last known address of Fanny Mae Davis and by publication in the Detroit Legal News once a week for a period of five weeks, naming Fanny Mae Davis, Willie Davis, Louis Scott and Paul Hines as Defendants (Motion for Substituted Service, ¶4). Wayne County Circuit Court Judge Thomas J. Foley granted that request (1a).

Plaintiffs filed a Default, and judgment was entered against Fanny Mae Davis, Willie Davis, Louis Scott and Paul Hines in favor of Robert Rodgers in the sum of EIGHT THOUSAND AND 00/100 DOLLARS ($8,000.00) and Johnny Hampton in the sum of FOUR THOUSAND AND 00/100 DOLLARS ($4,000.00) together with interest and costs (3a).

Two days later, Plaintiffs filed an Affidavit for Garnishment After Judgment against the Detroit Automobile Inter-Insurance Exchange [hereinafter DAIIE]. Garnishee Defendant DAIIE moved to vacate the Default Judgment and to dismiss the garnishment for the reason that the court's Order for Substituted Service was contrary to Michigan General Court Rule [hereinafter G.C.R. 1963] 105.8[1] and was not calculated to give the principal Defendants actual notice of the proceedings and an opportunity to be heard (Motion to Vacate Default Judgment and to Dismiss Garnishment, ¶5). The Motion was denied (5a-6a).

The trial of garnishee liability took place before Wayne County Circuit Judge Theodore R. Bohn, sitting without a jury. An Opinion was issued (6a-14a) and Judgment was entered in favor of Plaintiffs and against Garnishee Defendant (14a-15a).

RAISING THE FEDERAL QUESTION

DAIIE took an appeal of right to the Michigan Court of Appeals. In the first paragraph of its Brief on Appeal, DAIIE stated:

> "This appeal is filed in behalf of appellant's insured, Willie Davis, Louis Scott and Fannie Mae Davis who we believe are still without notice of this pending suit. Plain-

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[1]The Committee Notes explaining the Rule establish that it is to be construed to authorize any method of service valid under the due process clause of the Fourteenth Amendment to the United States Constitution. 1 Honigman & Hawkins, Michigan Court Rules Annotated, Rule 105.8, Committee Notes, pp. 111-12.

The Michigan General Court Rules do expressly authorize service of process by publication, but only "in civil actions in which personal jurisdiction over a defendant is *not* required . . . ." G.C.R. 1963, 106.1 (emphasis added).

tiffs-Appellees were seeking a judgment for money damages against the principal defendants. The complaint stated an action *in personam* and, therefore, required personal service of process in order for the court to acquire jurisdiction and also the power to enter a binding judgment. However, the principal defendants never received actual notice of the summons and complaint through personal service. The principal defendants were thereby denied any opportunity to defend and consequently suffered the denial of their constitutional right of due process."

In an unpublished per curiam opinion, (16a - 22a), the Michigan Court of Appeals vacated the Default Judgment against Fanny Mae Davis for failure on the part of the trial court to demand strict compliance with the requirements of service by registered mail. However, the Court of Appeals found no error in the trial court's allowance of substituted service on the principal Defendants by publication alone. It affirmed the Default Judgment against Willie Davis, Louis Scott and Paul Hines and affirmed the Garnishment Judgment against DAIIE.

After rehearing was denied by the Court of Appeals (22a-23a), DAIIE was granted leave to appeal to the Michigan Supreme Court (24a-25a). The parties were "directed to include among the issues to be briefed (1) whether the trial court erred in considering the prerequisites for substituted service when personal jurisdiction was required by not requiring an appropriate affidavit in support thereof to show diligent inquiry; and (2) whether the trial court erred in finding that GCR 1963, 105.8 authorizes service of process by publication to obtain personal jurisdiction as a means reasonably calculated to give actual notice of the proceedings and an opportunity to be heard." (24a)

Issue II. A. of Appellant's Brief of Appeal stated:

II.

"THE TRIAL COURT ERRED IN FINDING THAT WHERE PERSONAL JURISDICTION WAS REQUIRED, GCR 1963, 105.8 AUTHORIZED SERVICE OF PROCESS MY MERE PUBLICATION AS A MEANS REASONABLY CALCULATED TO GIVE ACTUAL NOTICE OF THE PROCEEDINGS AND AN OPPORTUNITY TO BE HEARD.

A.

UNDER THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND OF CONST. 1963, ART. 1, SEC. 17, PERSONAL JURISIDCTION MAY NOT BE PREMISED UPON SERVICE OF PROCESS BY PUBLICATION ALONE."

The Michigan Supreme Court filed its opinion in the instant case and its companion case, *Krueger* v. *Williams,* on February 3, 1981. (28a-50a). The Court framed the issues for decision in this case as follows:

> "In *Rodgers,* the second case before us, appellant DAIIE contests both the type of service which was allowed and the manner in which the substituted service was granted. It argues that to premise personal jurisdiction on service of process by publication alone is violative of the constitutional guarantee of a due-process right to notice. Appellant also contends that where personal jurisdiction is necessary, GCR 1963, 105.8, requires an appropriate affidavit of facts showing the diligent inquiry made by plaintiffs to locate defendants."

(40a-41a)

The Michigan Supreme Court went on to construe G.C.R. 1963, 105.8 as authorizing service of process by publication alone to obtain personal jurisdiction over a defendant, and sustained its validity against DAIIE's constitutional challenge. It then remanded the case to the trial court in order that Plaintiffs be permitted to show that, "prior to the time substituted service was originally ordered, they had exercised due diligence to locate defendants but were unable to serve them under other rules and that means better calculated to give actual notice than publication were not feasible . . ." (47a)

THE DECISION IS FINAL

Although there are further proceedings to occur in the state courts, the Michigan Supreme Court's decision is final within the meaning of 28 U.S.C. §1257(2). Michigan law precludes later review of the federal issue regardless of the outcome.

If, on remand, the trial court were to find in favor of Plaintiffs on the question of due diligence in attempting to locate the principal Defendants, governing state law would not permit DAIIE to re-assert the federal claims decided by the Michigan Supreme Court in the instant appeal. *Leland* v. *Ford*, 252 Mich. 547, 548, 233 N.W. 410, 411 (1930); *Pierce* v. *Riley*, 81 Mich. App. 39, 43, 264 N.W. 2d 110, 113 (1978) ("A conclusion reached in an earlier appeal to the Michigan Supreme Court becomes the law of the case and is not subject to review on appeal from a subsequent trial.") Therefore, the judgment of the Michigan Supreme Court is final. *Cox Broadcasting Corporation* v. *Cohn*, 420 U.S. 469, 485, 95 S. Ct. 1029, 1041, 43 L. Ed. 2d 328, 344 (1975); *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 162, 94 S. Ct. 407, 412, 38 L. Ed. 2d 379, 385 (1973). *See Shaffer* v. *Heitner*, 433 U.S. 186, 195 n.12, 97 S. Ct. 2569, 2575 n.12, 53

L. Ed. 2d 683, 692, n.12 (1977). *Cf. The General Council on Finance and Administration, United Methodist Church* v. *California Superior Court,* 439 U.S. 1369, 1371-72, 99 S. Ct. 35, 37, 58 L. Ed. 2d 77, 80 (1978).

If, on remand, the state court were to find against Plaintiffs, the federal issue would be moot, but an erroneous decision on a constitutional issue involving serious public consequences would remain. *Miami Herald Publishing Company* v. *Tornillo,* 418 U.S. 241, 246 n.6, 94 S. Ct. 2831, 2834 n.6, 41 L. Ed. 2d 730, 735 n.6 (1974); *North Dakota State Board of Pharmacy, supra,* at 159, 94 S. Ct. at 410, 38 L. Ed. 2d at 383. Refusal to review immediately the decision of the Michigan Supreme Court on the constitutional issue herein raised threatens serious erosion of federal policy — here the due process guarantee of notice prior to an affirmative imposition of liability.

It is imperative that the judgment in the instant case be treated as final. There is no suggestion that further federal questions will be decided on remand, the federal issue finally decided by the Michigan Supreme Court is separable from, and collateral to, the issues in the later proceedings, and reversal of the final decision of the Michigan Supreme Court on the federal issue would preclude further proceedings in the instant case. *See Shaffer* v. *Heitner, supra,* at 195 n.12, 97 S. Ct. at 2575 n.12, 53 L. Ed. 2d at 692 n.12; *North Dakota State Board of Pharmacy, supra,* at 162, 94 S. Ct. at 412, 38 L. Ed. 2d at 385. *See also National Socialist Party of America* v. *Village of Skokie,* 432 U.S. 43, 44, 97 S. Ct. 2205, 2206, 53 L. Ed. 2d 96, 98 (1977).

THE QUESTION IS SUBSTANTIAL

The issue in this appeal is whether a State's rule of procedure violates the due process quarantees of the Fourteenth Amendment to the United States Constitution by allowing

service of process by publication in a local newspaper to support a personal judgment against an individual, even though that individual's whereabouts are unknown and such a method of notification has no reasonable probability of providing actual notice to the individual.

The resolution of this issue will affect the practice of each of the United States. The importance of the subject matter involved does not derive from the peculiarities of a local practice, but rather transcends the immediate question concerning the rule here involved because of its impact upon the validity of personal judgments rendered by any court in the country. A pronouncement concerning the constitutional adequacy of the type of notice under discussion will have universal application. This is especially true given the trend toward the states' practice of defining the parameters of permissible service to the limits allowed by the United States Constitution. *E.g., Hutchins* v. *Del Rosso,* 116 N.H. 421, 365 A.2d 127, 129 (1976); *Avdel Corporation* v. *Mecure,* 58 N.J. 264, 277 A.2d 207, 209 (1971); *First Wyoming Bank* v. *Trans Mountain Sales & Leasing, Inc.,* 602 P.2d 1219, 1221 (Wyo. 1979).

Furthermore, the importance of the issue is not limited to the type of case here involved. Although its primary impact may be upon the significant number of automobile personal injury claims filed in the state courts, this Court's decision will necessarily affect any action seeking to impose affirmative personal liability upon an absent defendant. As has been noted, the advent of far-reaching long-arm statutes will result in courts increasingly being faced with problems concerning the sufficiency of notice to absent defendants. Note, *Civil Procedure — Constitutionality of Constructive Service of Process on Missing Defendants* [hereinafter *Constitutionality of Constructive Service*], 48 N.C.L. Rev. 616 (1970).

At present, the several States entertain widely divergent views concerning the constitutionality of the kind of service

at issue here. The highest court of at least one state which has had the opportunity to address the question under facts nearly identical to those of the instant case reached a conclusion directly in conflict with that of the Michigan Supreme Court.

In *Barnes* v. *Continental Insurance Company*, 231 Ga. 246, 201 S.E.2d 150 (1973), the Supreme Court of Georgia affirmed the dismissal of a complaint against an insurer on the ground that it was predicated upon an invalid default judgment against its insured. It held that the Georgia statutory scheme comported with due process standards in that it contained "no provision for service by publication in any action for personal judgment for a tort against any person, resident or nonresident." 201 S.E.2d at 151.[2]

Many more state courts have reached the same conclusion, albeit in factually dissimilar situations. The great majority of states which have addressed the issue of notice by publication in actions to impose affirmative personal liability have concluded that such notice cannot support a personal judgment. Because of the diversity of state statutes, court rules and decisions, the postures of the many states are not readily classified. However, certain broad categories stand out in Appellant's survey of state law included in the Appendix hereto (57a-61a).

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[2]In a later decision, the Georgia Supreme Court limited the *Barnes* reasoning by permitting service of process by publication on a resident defendant who had actual knowledge of a suit pending against him and who wilfully secreted himself to avoid service of process. *Melton* v. *Johnson*, 242 Ga. 400, 249 S.E.2d 82, 84-85 (1978). The Georgia court restricted its holding in *Melton* to the facts of that case (where actual notice was not disputed) and refused, on constitutional grounds, to extend it to all cases where a defendant conceals himself to avoid service of process. *Id.*, 249 S.E.2d at 85.

Most states addressing the issue hold that a state cannot impose personal liability on a defendant, resident or nonresident, where notice is given by means of publication, in the absence of a showing of actual notice. Of those states, twenty[3] totally preclude publication notice in actions for personal judgments. Another fourteen[4] prohibit the use of publication as a means of notice except upon a showing of concealment and avoidance of service by the defendant.[5] To the extent that the necessary finding of concealment or avoidance is a real, rather than pro forma, requirement, the exception merely provides for publication notice where the defendant already has actual notice. Unquestionably, the due process guarantee requires no more.

A minority of states permit notice by publication in actions to impose affirmative personal liability under circumstances in which it is plain that there is no reasonable probability that such notice will inform the defendant of proceedings which will adversely affect his legally protected interests. The highest court of two[6] states have explicitly approved such notice and in one other state, a lower court allowed such service.[7] Generally, these states permit notice by publication only after the plaintiff has made a showing of due diligence in attempting to ascertain the identity or whereabouts of the defendant. Such a pro forma requirement, of course, is conceptually unrelated to the question of the adequacy of notice to the

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[3]Arizona, Colorado, Connecticut, Delaware, District of Columbia, Florida, Idaho, Illinois, Louisiana, Maryland, Missouri, Montana, New Hampshire, New Jersey, New York, North Dakota, Rhode Island, Tennessee, West Virgina, Wisconsin.

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[4]Alabama, California, Georgia, Indiana, Iowa, Kansas, Minnesota, Nebraska, New Mexico, Ohio, Oregon, South Carolina, South Dakota, Washington.

(continued on next page)

defendant, but rather expresses a policy decision to allow judgments to be taken against absent individuals even where there exists no likelihood of actual notice.

Notwithstanding the varied and inconsistent perspectives entertained by the several states, the issue herein presented has not been decided by this Court. This Court's decisions have left the sufficiency of the type of service under discussion an open question, 4 Wright & Miller, Federal Practice and Procedure, Civil (1969) §1115 at 472; Note *Constitutionality of Constructive Service,* 48 N.C.L. Rev. 616 (1970); Note, *Service by Publication on a Defendant Who Cannot Be Located in California* [hereinafter *Service by Publication*], 3 U.S.F.L. Rev. 320 (1969), as reference to the decisions of this Court relating to the questions will demonstrate.

In *McDonald* v. *Mabee,* 243 U.S. 90, 37 S. Ct. 343, 61 L. Ed. 608 (1917), Justice Holmes, writing for a unanimous Court, held that publication in a local newspaper was insufficient notice to sustain a personal judgment against a domiciliary of the forum state who had left the state, not intending to return. Although the holding itself appears to dispose of the issue in the instant case favorably to Appellant, four aspects of the *McDonald* decision qualify its impact.

First, it did not involve a defendant whose whereabouts could not be ascertained. Second, it is difficult to determine

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[5]In its unpublished per curiam opinion in this case, the Michigan Court of Appeals stated that "[t]he evidence indicates that defendants have purposefully concealed their whereabouts." (21a). This unwarranted finding of fact finds no support from the record.

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[6]Hawaii, Michigan.

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[7]North Carolina.

with any precision the extent to which the analysis in that case was premised upon the territorial restrictions imposed by *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L. Ed. 565 (1877), which have since been undermined by subsequent decisions. Note, *Must Service of Process Be Personal In Order to Obtain In Personam Jurisdiction?* 35 Mo. L. Rev. 260 (1970); Note, *Service by Publication*, 3 U.S.F.L. Rev. 320 (1969). Third, it is similarly uncertain whether the same result would have been reached if service by publication — although futile — had been "the substitute . . . most likely to reach the defendant . . . ." 243 U.S. at 92. Finally, subsequent decisions of this Court have engendered doubt as to the extent and continued vitality of the precise holding in the *McDonald* case.

In *Wuchter* v. *Pizzutti*, 276 U.S. 13, 48 S. Ct. 259, 71 L. Ed. 446 (1928), this Court held that a statute making an officer of the state a proper person to receive process for an allegedly negligent non-resident motorist must also provide for a method of serving the defendant in a manner "reasonably probable" to give him actual notice of the lawsuit. However, as is apparent from the holding itself, the *Wuchter* decision is not directly on point with the instant case.

This Court's next major decision relating to the question here involved was *Milliken* v. *Meyer*, 311 U.S. 457, 61 S. Ct. 339, 85 L. Ed. 278 (1940). In that case, this Court held that the existence of a person's domicile in a state was sufficient to warrant that state's exercise of personal jurisdiction over him even though the service of process upon him took place in another state. In *dicta* (the adequacy of the notice received was not at issue), Justice Douglas indicated that the adequacy of the notice would depend upon whether it was "reasonably calculated" to give actual notice of the proceedings. However, the impact of that decision upon the holding in *McDonald* v. *Mabee, supra*, is unclear because the latter case was cited with reference to the adequacy of substituted service.

The decision most frequently cited as authoritatively establishing the constitutional parameters governing the adequacy of notice is *Mullane* v. *Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). In *Mullane*, this Court held that service by publication was constitutionally sufficient as to beneficiaries of a trust fund whose interests or whereabouts could not be ascertained through the exercise of reasonable diligence. In so holding, this Court stated that "in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." 339 U.S. at 317. However, reasoned analysis of two aspects of the *Mullane* decision compels the conclusion that it did not decide the issue presented here.

First, neither the language of the above-quoted passage nor the underlying considerations pertinent to the type of case there involved are applicable here. The *Mullane* case concerned the very ability of the state to provide a method for settling trust accounts. (The importance of that aspect of *Mullane* will be further discussed below). Furthermore, unlike the instant case, the purpose of that action was not the affirmative imposition of liability upon an individual, but the "foreclosure [of] rights" to challenge the trustee's decision. Given that the degree of notice "appropriate to the nature of the case", 339 U.S. at 313, will vary depending upon the nature of the interests involved and the extent and seriousness of the consequences to the party entitled to notice, *Mullane* is eminently distinguishable from the instant case on both grounds.

Second, the approval of a "probably futile" method of notification in *Mullane*, conflicts with the requirement imposed in *Wuchter* v *Pizzutti, supra*, that the notification necessary to a tort defendant be "reasonably probable" to give him actual

notice of the action. In this regard it should be noted that the latter case was cited with apparent approval by the *Mullane* Court. 399 U.S. at 315.

The only decisions since *Mullane* which have addressed the adequacy of notice are inapposite. In both *Walker* v. *City of Hutchinson*, 353 U.S. 112, 77 S. Ct. 200,1 L. Ed. 2d 178 (1956) and *Schroeder* v. *City of New York*, 371 U.S. 208, 83 S. Ct. 279, 9 L. Ed. 2d 255 (1962), this Court held publication insufficient to warrant action affecting the respective appellants' realty where there existed an easily effected and superior method of notification. Both the nature of the respective cases and the circumstances there present (readily ascertainable whereabouts of the property owners) distinguish them from the case-at-bar.

Finally, the focus of this Court's attention in recent years has not been upon the questions of notice but rather upon the conceptually distinct issue of the degree of "contact" required to justify a state's assertion of personal jurisdiction over a defendant in the first instance. *E.g.*, *Rush* v. *Savchuck*, 444 U.S. 320, 100 S. Ct. 571, 62 L. Ed. 2d 516 (1980); *World-Wide Volkswagen Corporation* v. *Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980); *Kulko* v. *Superior Court of California*, 436 U.S. 84, 98 S. Ct. 1690, 56 L. Ed. 2d 132 (1978); *Shaffer* v. *Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977).

Not since the *McDonald* decision in 1917 has this Court rendered any holding concerning the quality of notice necessary to maintain the affirmative imposition of personal liability upon an individual defendant. Subsequent decisions of this Court have not clarified the question whether service by publication alone is sufficient to impose such liability upon a missing person, and the decision most frequently cited in such situations is itself more than 30 years old. *Mullane*, *supra*.

The only relatively recent disposition of this Court in any way related to the question here involved was in *Nelson* v. *Manley, cert. denied sub nom. Soszka* v. *Manganaro*, 394 U.S. 573, 89 S. Ct. 1299, 22 L. Ed. 2d 555 (1969) (denying certiorari). That case, however, provides no basis for declining to entertain the appeal in the instant case.

First, the question presented in *Nelson* was narrowly restricted to a concededly "singular and unprecedented" provision in a particular state's non-resident motorist statute. *Nelson* v. *Manley, supra,* Jurisdictional Statement at 10. No persuasive reason is apparent for this Court's hearing an appeal and rendering a decision whose applicability would be so limited. In contrast, the issue presented in the case-at-bar carries direct implications for every notice provision in every state pertaining to actions seeking to impose personal liability upon an individual. See the survey of pertinent state law set out in the Appendix hereto (57a-61a).

Second, the appellant/petitioner in *Nelson* failed to bring to this Court's attention the fundamental and inherent distinction (discussed below) between judgments imposing personal liability, *see, e.g., Wuchter* v. *Pizzutti, supra; McDonald* v. *Mabee, supra,* and those involving merely a foreclosure of rights with regard to certain property or status, *see, e.g., Mullane* v. *Central Hanover Bank & Trust Company, supra.* That distinction, although necessary to a well-reasoned determination of the issue, is not so apparent on the face of this Court's prior opinions as to warrant the presumption that this Court considered it in response to the limited legal exposition in the *Nelson* Jurisdictional Statement.

Finally, whatever the precedential value to be accorded the disposition in *Nelson,* it is undeniable that there has been no general recognition that it answered the question here involved. Reference to the commentary discussing the issue and related matters since 1969 suggests that the question posed

requires a more definitive answer. *See* Note, *Service of Process by Mail*, 74 Mich. L. Rev. 381 (1975); Note, *Must Service of Process Be Personal in Order to Obtain In Personam Jurisdiction?* 35 Mo. L. Rev. 260 (1970); Note, *Constitutionality of Constructive Service*, 48 N.C.L. Rev. 616 (1970); Note, *Constitutional Law: The Validity of Service of Process by Mail When There Is No Return Receipt: The Outer Limits of Due Process*, 25 Okla. L. Rev. 566 (1972); Note, *Service by Publication*, 3 U.S.F.L. Rev. 320 (1969).

Despite the absence of a definitive pronouncement from this Court on the question, Appellant submits that the principles established by this Court's prior decisions and the nature of the liability involved compel the conclusion that the type of notice authorized by the Court Rule in this case cannot pass constitutional muster. The Michigan Supreme Court clearly erred in holding that G.C.R. 1963, 105.8 authorizes service of process by publication above as a permissible means of affording a defendant notice of an action seeking to impose affirmative personal liability upon him.

It is, of course, not necessary that the method of notification result in actual notice to the parties. *E.g.*, *Mullane* v. *Central Hanover Bank & Trust Company*, *supra*; *McDonald* v. *Mabee*, *supra*. Rather, the proper focus of inquiry is the degree of likelihood that the prescribed method will impart such notice. Appellant contends that the degree of likelihood of actual notice required for actions seeking to impose affirmative liability upon a defendant is greater than for other types of actions.

Appellant does not premise its position on the *in personam/in rem* distinction *per se*, which was rejected by this Court in the *Mullane* decision. Indeed, Appellant concurs that such a distinction is not useful for two related reasons: the vagaries of state law preclude a nationally uniform characterization of actions on that basis; and any rule premised upon such a

distinction would turn on considerations not relevant to the factors properly dispositive of the quality of notice appropriate to a given case.

It is for those very reasons that the distinction here advanced stands as a principled and workable basis for decision. As already noted, this Court has stated that the kind of notice required must be "appropriate to the nature of the case". *Mullane,* 339 U.S. at 313. As shall be hereinafter demonstrated, Appellant's characterization of the nature of the instant case and those like it is grounded upon the nature of our social-political-economic system as well as upon the decisions of this Court.

It is inherent in our system of government that there are certain types of cases in which it is absolutely imperative that a decision concerning the subject matter of the action be possible under *all* circumstances, including the absence of some of the interested parties. For example, a system premised upon private ownership of property would eventually cease to function viably without some means of determining rights in property under any and all circumstances. Similarly, social necessity mandates that certain determinations concerning status (e.g. divorce) be possible in all situations. In such cases, the possibility of some decision is a matter of systemic necessity. The reasoning underlying this Court's decision in the *Mullane* case recognized that fact:

> "Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. ***But the vital interest of the State in bringing any issues as to its fiduciaries to final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined.*** A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified.

> "Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment."

Mullane, 339 U.S. at 113-14 (emphasis added).[8] Furthermore, concluding that the absence of any notice to certain of the interested trust beneficiaries was a "justifiable" and "reasonable risk", this Court relied upon the presence of parties actually notified whose interests were identical to those of the unnotified persons. *Id.*, 339 U.S. at 319. The distinction between the type of case involved in *Mullane, supra*, and personal injury cases has been noted. Note, *Constitutionality of Constructive Service*, 48 N.C.L. Rev. 616, 622 n.30.

On the other hand, actions seeking to impose affirmative liability upon a defendant are governed by quite different considerations. First, the systemic necessity for a decision under all circumstances is absent. Although both an injured party and the state have an interest in providing a means whereby the former can recover money damages for his injuries, that interest is by no means "vital" in the same sense as the ability to determine interests in property or other matters affecting the very viability of the governmental system.

Furthermore, the affirmative nature of the liability imposed in a personal injury action is more momentous in kind and scope than the "foreclosure of rights" regarding particular property or status. Such affirmative liability exposes all of a person's assets (save those specifically protected) to further judicial action to enforce the default judgment.

The only two decisions of this Court directly involving the sufficiency of notice in an action seeking to impose such liabil-

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[8] The two subsequent notice decisions reaffirming and applying the *Mullane* analysis both involved the disposition of real property. *Schroeder* v. *City of New York, supra; Walker* v. *City of Hutchinson, supra.*

ity rejected futile methods of notification as insufficient to sustain a judgment against an individual.

In *McDonald* v. *Mabee, supra,* this Court expressly rejected service by publication alone as insufficient notification to one who has left the forum state, noting that approving even service at the "last and usual place of abode" in such circumstances would be "going to the extreme." *Id.,* 243 U.S. at 92.

In *Wuchter* v. *Pizzutti, supra,* this Court characterized the requisite notice in broader terms. Citing a variety of state court decisions as well as the *McDonald* case, this Court held that the validity of service will be sustained "if the statutory provisions in themselves indicate that there is *reasonable probability* that if the statutes are complied with, the defendant will receive actual notice . . . ." *Id.,* 276 U.S. at 24 (emphasis added).

In the case-at-bar, there is no dispute but that the method of service employed was an almost certainly futile means of notifying the principal Defendants of the pendency of the lawsuit. Both this Court, *e.g., Mullane* v. *Central Hanover Bank & Trust Company, supra,* and the Michigan Supreme Court, *Dow* v. *State of Michigan,* 396 Mich. 192, 240 N.W.2d 450 (1976), have recognized that there is no reasonable probability that publication will give actual notice of the pendency of litigation:

> "'[N]otice by publication is a poor and sometimes a hopeless substitute for actual service of notice,' and . . . '[i]ts justification is difficult at best.'"

Schroeder v. *City of New York,* 371 U.S. at 213, quoting *New York* v. *New York, N.H. & H.R.R.,* 344 U.S. 293, 296, 73 S. Ct. 299, 97 L. Ed. 333 (1953).

Nevertheless, the Michigan Supreme Court held such service constitutionally adequate on the basis of this Court's deci-

sion in *Mullane, supra.* Briefly stated, the decision in the instant case was clearly erroneous for three reasons.

First, the Michigan Supreme Court failed to consider the fundamental distinctions between the "nature of the case" involved in *Mullane, supra,* and an action seeking to impose affirmative liability upon an absent defendant. As already demonstrated, the systemic necessity for some decision, the inherently limited nature of a "foreclosure of rights", and the presence of other litigants to protect the interests of the absent parties were the salient features of the *Mullane* decision. Without pertinent discussion, the Michigan Supreme Court applied the *Mullane* formula to impose affirmative and unlimited liability upon an individual in a case not involving matters which must always be capable of determination.

Second, the Michigan Supreme Court did not even allude to the decisions of this Court which directly addressed the quality of notice required to impose the kind of liability here involved, *Wuchter* v. *Pizzutti, supra,* and *McDonald* v. *Mabee, supra.* As was discussed above, those cases impose a more stringent notice requirement where the action concerns the imposition of liability as opposed to the mere "foreclosure of rights." Specifically, the *Wuchter* case stated that in actions such as the case-at-bar, the method of notification must be "reasonably probable" to impart actual notice. No one could seriously contend that publication in a local legal newspaper even approaches such a standard.

Third, the decision cannot be justified on policy grounds by balancing the respective interests of the plaintiffs, the defendant, and the state. *See* Note, *Constitutionality of Constructive Service,* 48 N.C.L. Rev. 616 (1970).

The plaintiff's interest is always the same: to have a source of recovery. The primary obstacle to insuring such recovery against a missing defendant is, of course, the statute of limita-

tions. The obvious and straightforward manner of avoiding that bar is to provide for the tolling of the statute of limitations during the period that plaintiff cannot, through the exercise of reasonable diligence, identify or locate the defendant. Although involving some inconvenience and uncertainty (given the impairment of evidence through the passage of time), such a compromise is eminently preferable to denying a defendant any trial at all prior to the imposition of considerable personal liability.

The defendant's interest, of course, is to be afforded an opportunity to defend the action prior to the imposition of such liability. Regardless of any mitigating measures suggested to reduce the impact of such a judgment, there is no adequate substitute for the defendant's actual presence to defend himself.

This Court should also note that the justifications customarily advanced in favor of resolving the dilemma in favor of the plaintiff necessarily *assume* the absent defendant's liability. *See, e.g.*, Note, *Constitutionality of Constructive Service*, 48 N.C.L. Rev. 616 (1970); Note, *Service by Publication*, 3 U.S.F.L. Rev. 320 (1969). Although such a presumption may be appropriate for underscoring the difficulty facing a plaintiff unable to locate a potential defendant, it hardly provides a principled basis for decision of the question under discussion. The fact remains that "due process" is a hollow phrase to a person upon whom large individual liability has been imposed in the absence of an opportunity to defend himself.

The state's interests do not preponderate in favor of either a plaintiff or an absent defendant. It has a self-evident interest in maintaining the integrity of its legal process by insuring that final judgments are rendered only after the fairness of the proceedings is assured. On the other hand, providing injured citizens a source of judicial recovery for tortiously inflicted injuries is also a legitimate concern. However,

nothing inherent in either of those considerations renders one predominant.

Furthermore, in personal injury cases, the *necessity* for the state to provide a method of determination is absent. *See Mullane, supra.* Thus, the conceptual vehicle for justifying dispensing with a meaningful notice requirement, which is legitimately invoked in property and status cases, is not available here.

In short, neither the plaintiff's interest nor those of the state provide a sufficient principled basis upon which to eliminate the absent defendant's rudimentary right to reasonable notice of an action against him. It is noteworthy in this regard that the Michigan Supreme Court did not even attempt an analytical explanation of its decision.

This Court has yet to make an authoritative and definitive pronouncement concerning the quality of notice necessary to sustain a judgment imposing personal liability upon a defendant. In the absence of such a decision, the several states have arrived at a variety of inconsistent conclusions concerning the constitutional adequacy of service by publication in such cases. The result has been a number of decisions (such as the one here involved) upholding judgments in which there was absolutely no reasonable probability of actual notice.

The importance of this issue is demonstrated by reference to its applicability not only to every state but also to every cause of action seeking to impose personal liability upon an individual. Reasoned consideration of the principles underlying the pertinent decisions of this Court concerning the quality of notice required to sustain judgments of different natures compels the conclusion that notice by publication alone will not support a judgment imposing personal liability on an individual.

CONCLUSION

This Court should summarily reverse the decision of the Michigan Supreme Court and remand this case to that Court with instructions to vacate the judgment against the individual Defendants for lack of personal jurisdiction and to vacate the subsequent garnishment judgment against the Detroit Automobile Inter-Insurance Exchange.

Alternatively, this Court should accept the case for plenary review either as an appeal or, pursuant to 28 U.S.C. §2103, as a petition for certiorari granted.

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May, 1981

80-1861

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IN THE

Supreme Court of the United States

October Term, 1980
No.

DETROIT AUTOMOBILE
INTER-INSURANCE EXCHANGE, ET AL.,
Appellants,
-vs-
ROBERT RODGERS and JOHNNY HAMPTON,
Appellees.

ON APPEAL FROM THE
SUPREME COURT
OF MICHIGAN

APPELLANT'S APPENDIX

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May, 1981

NATIONAL REPRODUCTIONS CORPORATION, DETROIT, MICHIGAN

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STATE OF MICHIGAN
CIRCUIT COURT FOR THE
COUNTY OF WAYNE

ROBERT RODGERS AND
JOHNNIE HAMPTON,
Plaintiffs,

vs.

PAUL HINES

CITY OF DETROIT, MICHAEL DE-WOLF, DETROIT POLICE DEPARTMENT, DEPARTMENT OF STREET RAILWAYS, DELMAR LAWRENCE, FANNY MAE DAVIS, WILLIE DAIVS, LOUIS SCOTT, JAMES M HARE, Secretary of State of the State of Michigan, Jointly and Severally
Defendants.

Civil Action
No. 162-825

ORDER FOR SUBSTITUTED SERVICE

At a session of said Court held in the City-County Building in the City of Detroit, County of Wayne, State of Michigan, this May 27, 1971.

PRESENT: HONORABLE THOMAS J. FOLEY, Circuit Court Judge

Upon hearing in open court, and the court being fully advised in the premises;

Order for Substituted Service

IT IS HEREBY ORDERED that defendant, Fanny Mae Davis, be served through registered mail at her last known address, and that service also be made through the Detroit Legal News by publishing in the Detroit Legal News once a week for a period of five weeks naming defendants Fanny Mae Davis, Louis Scott, Willie Davis and Paul Hines, giving said defendants notice of this cause of action.

/s/ THOMAS J. FOLEY
CIRCUIT COURT JUDGE

Approved as to form:

/s/ RICHARD B. KRAMER
/s/ DAVID GRAINER
/s/ JOHN F. POTVIN

STATE OF MICHIGAN
CIRCUIT COURT FOR THE
COUNTY OF WAYNE

ROBERT RODGERS AND
JOHNNIE HAMPTON,
Plaintiffs,

vs.

CITY OF DETROIT, MICHAEL DE-WOLF, DETROIT POLICE DEPARTMENT, DEPARTMENT OF STREET RAILWAYS, DELMAR LAWRENCE, FANNY MAE DAVIS, WILLIE DAVIS, LOUIS SCOTT, PAUL HINES, AND JAMES M. HARE, Secretary of State of the State of Michigan, Jointly and Severally,
Defendants.

Civil Action
No. 162 825

DEFAULT JUDGMENT

At a session of said Court held in the City-County Building in the City of Detroit, County of Wayne, State of Michigan, this March 24, 1972.

PRESENT: HONORABLE THOMAS J. FOLEY, Circuit Court Judge

The default of FANNY MAE DAVIS, WILLIE DAVIS, LOUIS SCOTT and PAUL HINES, only, defendants in the above-entitled action, for failure to plead or otherwise defend having been entered; and upon proof in open court that

plaintiff, ROBERT RODGERS is entitled to recover damages in the sum of Eight Thousand Dollars ($8,000), and plaintiff, JOHNNIE HAMPTON, is entitled to recover damages in the sum of Four Thousand Dollars ($4,000), and it appearing that the defendants, FANNY MAE DAVIS, WILLIE DAVIS, LOUIS SCOTT AND PAUL HINES are not infants or incompetent persons, and are not in the military service of the United States.

IT IS ORDERED AND ADJUDGED that plaintiff, ROBERT RODGERS recover of the defendants, FANNY MAE DAVIS, WILLIE DAVIS, LOUIS SCOTT AND PAUL HINES, only, the sum of Eight Thousand Dollars ($8,000), together with interest at 5% per annum, court costs and attorney fees amounting to

IT IS ORDERED AND ADJUDGED that plaintiff, JOHNNIE HAMPTON, recover of the defendants, FANNY MAE DAVIS, WILLIE DAVIS, LOUIS SCOTT AND PAUL HINES, only, the sum of Four Thousand Dollars ($4,000), together with interest at 5% per annum, court costs and attorney fees amounting to $75.00.

/s/ THOMAS J. FOLEY
CIRCUIT COURT JUDGE

STATE OF MICHIGAN
CIRCUIT COURT FOR THE
COUNTY OF WAYNE

ROBERT RODGERS AND
JOHNNIE HAMPTON,
Plaintiffs,

vs.

FANNY MAE DAVIS, WILLIE DAVIS,
LOUIS SCOTT and PAUL HINES,
Principal Defendants,

Civil Action
Number
162 825

DETROIT AUTOMOBILE INTER-
INSURANCE EXCHANGE,
Garnishee Defendant.

ORDER DENYING MOTION TO VACATE JUDGMENT

At a session of said Court being held in the City-County Building, City of Detroit, County of Wayne, State of Michigan, on December 10, 1975

PRESENT: Honorable THOMAS J. FOLEY

This matter having come on for hearing and the court being fully advised in the premises;

IT IS HEREBY ORDERED that Garnishee Defendant's motion to vacate judgment is hereby denied with prejudice and without costs to either party.

THOMAS J. FOLEY

Approved as to form:

/s/ DAVID TUFFLEY
Attorney for Garnishee Defendant

STATE OF MICHIGAN
CIRCUIT COURT FOR THE
COUNTY OF WAYNE

ROBERT RODGERS AND
JOHNNIE HAMPTON,
Plaintiffs,

vs.

FANNY MAE DAVIS, WILLIE DAVIS, LOUIS SCOTT, PAUL HINES and RICHARD H. AUSTIN, Secretary of State, State of Michigan, Jointly and Severally,
Principal-Defendants)

C.A. NO:
70-162-185

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE,
(Garnishee-Defendant)

OPINION

The court in this matter was presented with the trial of a garnishee liability case without a jury. The plaintiffs, Robert Rodgers and Johnnie Hampton, obtained a default judgment on March 24, 1972 against the defendants, Fanny Mae Davis, Willie Davis, Louis Scott and Paul Hines. The judgment in favor of Plaintiff Robert Rodgers was in the amount eight-thousand dollars ($8,000.), plus costs of thirty-seven dollars and fifty cents ($37.50). The judgment in favor of Plaintiff Johnnie Hampton against the defendants was in the amount of four-thousand dollars ($4,000.), plus costs of thirty-seven dollars and fifty cents ($37.50).

Subsequent to the entry of the default judgment, the garnishee defendant filed a motion to set aside the default judgment entered against the principal defendants on March 24, 1972. The basis of the motion was that there was irregularity and impropriety in obtaining the entering of the judgment referred to above due to the failure to obtain personal service on the principal defendants, but in fact, service was obtained properly by substituted service. The motion to set aside the default judgment was denied by the court, inasmuch as the court was satisfied that jurisdiction was obtained on the principal defendant by and through substituted service.

Subsequent to the entry of the default judgment a Writ of Garnishment was filed with the court on or about April 26, 1976 naming the Detroit Automobile Inter-Insurance Exchange garnishee-defendant of the principal defendants Fanny Mae Davis, Willie Davis and Louis Scott. Subsequent to the service of the Writ of Garnishment on the garnishee defendant, the garnishee defendant did file a disclosure wherein they admitted the policy of insurance was in effect on the date of the accident; that being policy number 1-2180024-1. The garnishee defendant in their disclosure claimed that

they had not received proper notice of the accident or suit in order to allow a timely investigation. Judge Thomas J. Foley ordered that the garnishment matter go on the garnishment trial docket for a hearing on the garnishment disclosure.

The Secretary of State was originally made a party defendant on August 11, 1970 when the suit was started based on an allegation that there was an unknown driver or owner involved. The other defendants were subsequently added. The Secretary of State remains in the suit subject to a determination on damages and liability against the defendant.

The garnishee defendant, Detroit Automobile Inter-Insurance Exchange, admitted that it had a policy of insurance in effect on the named insured, Willie Davis, and his driver, Louis Scott, at the time of the accident, being policy number 1-2180024-1. The garnishee defendant in its disclosure denied it was liable under the policy because the insured or his driver failed to notify the Exchange of the principal case and it failed to tender suit papers therein, that being a material breach of the following conditions set forth in the policy contract:

(a) General Condition, Sec. 2, Notice. If claim is made or suit is brought against the insured he shall immediately forward to the Exchange every demand, notice, summons or other process received by him or his representative.

(b) Under General Provisions, Sec. 3 Requiring the assistance and cooperation of the insured, the principal defendant never tendered to Detroit Automobile Inter-Insurance Exchange suit papers received in the principal case, nor did he ever inform Detroit Automobile Inter-Insurance Exchange of the action.

(c) Under the General Conditions, Sec. 5 No action shall lie against the exchange unless as a condition precedent the insured shall have fully complied with all the terms of this policy.

The Exchange contended that there was prejudice because:

(a) It was unable to timely investigate the accident;

(b) It was unable to contact the parties to negotiate a disposition favorable to it;

(c) It was unable to set up a reserve for the claim;

(d) It was unable to appoint counsel to enter a defense to the action in Circuit Court.

It was agreed that the Exchange did receive notice of this accident on claim file number PO30038 and received notice of a suit being started by Attorney Barbara Robb on or about June 13, 1969 on behalf of two other plaintiffs, Haddie and Walter Clark.

Richard Haskins, attorney for the Exchange, testified for the garnishee defendant. He testified that while he had knowledge of the case started by Attorney Barbara Robb, he had no personal knowledge nor had he received notice of the institution of a lawsuit by the named insured nor the driver, Louis Scott. It is to be noted that Attorney Haskins did locate Louis Scott in Jackson Prison and wrote to him on July 2, 1969 asking him to turn over to the Exchange the summons and the complaint that Scott received while he was in the county jail. The letter, Exhibit 15, made reference to an accident occurring on August 15, 1968.

The court is satisfied that there is no distinction between the facts in this case and those in the case of *Bibb* v *Dairyland Insurance Company*, 44 Mich App 440. The law presented in that case is controlling here. The court stated on page 443:

"The Michigan courts have required a showing that insurance companies be prejudiced by delay or lack of notice regarding claims brought against their insured. *Kennedy* v *Dashner*, 319 Mich 491 (1947); *Weller* v *Cummins*, 330 Mich 286 (1951); *Wendel* v *Swanberg*, 384 Mich 468 (1971)."

The court further stated on page 444:

"The necessity that prejudice constitute a basic element of an insurer's defense to payment based upon delay or lack of notice was further examined in *Weller* v *Cummins*, *supra*. The Supreme Court determined that insurance companies would not be prejudiced if they received adequate and timely information of the accident or of the institution of an action for the recovery of damages, regardless of the source of its information. Defendant insurance company was not permitted to ignore notice of suit against it by plaintiffs' attorney and then rely upon the insured's failure to give notice as a defense."

In the case of *Wendel* v *Swanberg*, 384 Mich 468 the Supreme Court succinctly capsulized the legal principles regarding notification and prejudice, pp 447-478:

"Provisions in liability insurance contracts requiring the insured to give the insurer immediate or prompt notice of accident or suit are common, if not universal, The purpose of such provisions is to allow the insurer to make a timely investigation of the accident in order to evaluate claims and to defend against fraudulent, invalid, or excessive claims. *Wehner* v *Foster*, 331 Mich 113 (1951); *Exo* v *Detroit Automobile Inter-Insurance Exchange*, 259 Mich 578 (1932); See also, *Anno*, 18 ALR2d 443; Comment, 51 Mich L Rev 275. The pertinent legal principles deducible

from our cases and statutes regarding such notice provisions are as follows:

"1) Notice to an authorized agent is notice to the insurer. By statute liability insurance policies must contain a provision that notice given by or on behalf of the insured to any authorized agent of the insurer within this state, with particulars sufficient to identify the insured shall be deemed to be notice to the insurer***.' MCLA 500.300008; MSA 24.13008. Mandatory statutory provisions are read into insurance contracts though they be omitted by the parties. *Galkin* v *Lincoln Mutual Casualty Co*, 279 Mich 327 (1937); *Chrysler Corp* v *Hardwick*, 299 Mich 696 (1941).

"2) Mere delay in giving the required notice does not work a forfeiture because such provisions are construed to require notice within a reasonable time. *Kennedy* v *Dashner*, 319 Mich 491 (1947); *Exo* v *Detroit Automobile Inter-Insurance Exchange, supra.*

"3) Prejudice to the insurer is a material element in determining whether notice is reasonable given (*Wehner* v *Foster, supra; Weller* v *Cummins*, 330 Mich 286 [1951]) and the burden is on the insurer to demonstrate such prejudice. *Kennedy* v *Dashner, supra; Wehner* v *Foster, supra.*"

The court was presented with testimony from Robert Gittleman, attorney for the plaintiffs, Carl R. Carlson, assistant district claims supervisor of the Motor Accident Fund and Richard Haskins, an attorney with the Exchange.

The testimony establishes that the garnishee defendant had notice of the case long before the default judgment was taken against the defendants. The garnishee defendant was notified of the accident at the time Attorney Barbara Robb started her

lawsuit on June 13, 1969. The garnishee defendant was made aware of the other claims resulting from the accident. Robert Gittleman, attorney for the plaintiffs, testified that he sent notification of the plaintiffs' claim to the garnishee defendant on or about August 7, 1969. A copy of the letter was received as an exhibit. On or about February 9, 1971 a letter was mailed to Richard Haskins, 150 Bagley Avenue, Detroit, Michigan, from Robert Gittleman advising Haskins of the claim and enclosing a copy of the summons and complaint.

C. R. Carlson, who had been assistant claims supervisor of the Motor Accident Claims Fund, testified that he was in contact with Richard Haskins regarding the claims of Robert Rodgers and Johnnie Hampton as early as January, 1971. He testified that he had several conversations with Mr. Haskins concerning this accident and the plaintiffs. In October, 1971, Carlson offered to turn the file over to Mr. Haskins.

Richard Haskins did in fact write to Louis Scott on July 7, 1969. Louis Scott was in Jackson Prison at the time. The letter is Exhibit 15 and reads as follows:

July 7, 1969

State Prison of Southern Michigan
Louis Scott #122305
4000 Cooper Street
Jackson, Michigan 49201

RE: Accident of 8/15/68

Dear Mr. Scott:

I believe while in the Wayne County Jail on February 3, 1969 you were served with a summons and complaint concerning an automobile accident. Would you please turn these papers over to your insurance company immediately.

If you have any further questions, please contact me by letter at 150 Bagley Avenue, Detroit, Michigan.

Very truly yours,

Richard Haskins

RH/ph

Mr. Haskins was the only witness for the garnishee defendant. His testimony was that he personally never had any conversation with Robert Gittleman and had no client to defend. He took no action.

The court is of the opinion based upon the testimony presented that the garnishee defendant has failed to sustain the burden of proof that it was prejudiced.

The court adopts the last two paragraphs of *Bibb, supra,* as a conclusion since its language is applicable to the facts in this case.

It is incumbent upon the defendant to sustain the burden of proof as to any prejudice suffered by a delay in the notification of suit being brought against the insured. However, defendant introduced no evidence as to any prejudice that might have been suffered. No evidence even suggests that defendant was prevented from making a timely investigation of the accident in order to evaluate claims or to defend against fraudulent, invalid, or excessive claims. Indeed, it is reasonable to assume that a thorough investigation was a necessary requisite prior to entering into negotiations for a settlement of the claim.

Defense counsel was aware that lack of prejudice could be advanced as a defense by plaintiffs, yet apparently was willing to base his defense on lack of notice alone. No witnesses were

produced to reveal any prejudice suffered by defendant. Defendant expended no effort to protect its interest once it was notified. We cannot presume it would have proceeded any differently had it been notified earlier. The burden was not sustained in this case.

/s/ THEODORE R. BOHN
CIRCUIT JUDGE

STATE OF MICHIGAN
CIRCUIT COURT FOR THE
COUNTY OF WAYNE

ROBERT RODGERS AND
JOHNNY HAMPTON,
Plaintiffs

vs

FANNIE MAE DAVIS, LEE DAVIS, LOUIS SCOTT, PAUL HINES AND RICHARD H. AUSTIN, Secretary of State, State of Michigan, jointly and severally,
Principal Defendants.

No.
70-162-185

DETROIT AUTOMOBILE INTER INSURANCE EXCHANGE.
Garnishee Defendant.

JUDGMENT

At a session of said Court held in the City-County Building in the City of Detroit, County of Wayne, State of Michigan on the February 25, 1977.

PRESENT: Hon. THEODORE R. BOHN, Circuit Court Judge.

The above entitled action having been tried by the Court without a Jury, and the Court having filed findings of fact, and having concluded a Judgment should be rendered in favor of the Plaintiffs, Robert Rodgers and Johnny Hampton, against the Garnishee Defendant, Detroit Automobile Inter Insurance Exchange, only, in the respective amounts of Eight Thousand ($8,000.00) Dollars on behalf of Plaintiff, Robert Rodgers and Four Thousand ($4,000.00) Dollars on behalf of Plaintiff, Johnny Hampton;

IT IS HEREBY ORDERED that Judgment be entered in favor of the Plaintiffs, Robert Rodgers and Johnny Hampton, and against the Garnishee Defendant, Detroit Automobile Inter Insurance Exchange, in the respective amounts of Eight Thousand ($8,000.00) on behalf of Robert Rodgers and Four Thousand ($4,000.00) Dollars on behalf of Johnny Hampton, together with interest at the rate of Five Percent (5%) in the respective amounts of One Thousand Nine Hundred Thirty-Four ($1,934.00) Dollars and Nine Hundred Sixty-Seven ($967.00) Dollars, and costs in the total amount of One Hundred Sixty-Five ($165.00) Dollars.

/s/ THEODORE R. BOHN
CIRCUIT COURT JUDGE

Approved as to form:

/s/ DAVID TUFFLEY
/s/ JOHN POTVIN

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT RODGERS AND JOHNNY HAMPTON,
Plaintiffs-Appellees,

v

FANNY MAE DAVIS, WILLIE DAVIS, LOUIS SCOTT, PAUL HINES and RICHARD H. AUSTIN, Secretary of State, State of Michigan, Director of the Motor Vehicle Accident Claims Fund,
Defendants-Appellees,

v

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE,
Garnishee Defendant
-Appellant.

JUN 08 1978

No. 77-1107

Before: M. J. Kelly, P.J., and T.M. Burns and R.M. Maher, JJ. Per Curiam

The instant case resulted from a bus-police car collision on August 15, 1968 in the City of Detroit, in which plaintiffs, passengers on the bus, were injured. The police car was in pursuit of a vehicle owned by defendants Fanny Mae and Willie Davis, and driven by either defendant Louis Scott or defendant Paul Hines. The Davis vehicle was insured by the

garnishee defendant Detroit Automobile Inter-Insurance Exchange (DAIIE). The parties have stipulated to the facts which serve as the record on appeal. We incorporate the parties' stipulation by reference without repeating it as this would serve no purpose in an unpublished per curiam opinion.

After default judgment was entered on March 24, 1972 by Wayne County Circuit Court against defendants Fannie Mae Davis, Willie Davis, Louis Scott and Paul Hines in favor of Robert Rodgers in the amount of $8,000 and Johnny Hampton in the amount of $4,000, the garnishment action progressed to judgment against garnishee defendant-appellant on which this appeal is based.

The garnishee contends that it is relieved from liability under the insurance policy because of the failure of the insured to give the company notice of the accident and subsequent lawsuit. The garnishee's argument is based upon technical non-compliance by its insured with the following policy provisions:

"CONDITIONS

"2. NOTICE
SECTIONS, I, II, III

"In the event of an accident, occurrence or loss, written notice shall be given by or for the insured to the Exchange or its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and all reasonably obtainable information with respect to the time, place and circumstances thereof and the names and addresses of the injured and of available witnesses. In the event of theft, the insured shall also promptly notify the police. If claim is made or suit is brought against the insured, he shall immediately forward to the Exchange every demand, notice,

summons or other process received by him or his representative.

"3. Assistance and Cooperation of Insured
SECTIONS I AND III

"The insured shall cooperate with the Exchange, and, upon the Exchange's request, attend hearings and trials, assist in making settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident.

"5. Action Against the Exchange
SECTIONS I, II, III

"No action shall lie against the Exchange unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor, (1) under Sections II and III, until 30 days after the proof of loss is filed and the amount of loss is determined as provided in this policy; (2) under Section I, until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the Exchange. Any person or organization or legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or organization shall have any right under this policy to join the Exchange as a party to any action against the insured to determine the insured's liability, nor shall the Exchange be impleaded by the insured or his legal representative. Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the Exchange of any of its obligations hereunder."

The garnishee's argument is not persuasive. The garnishee did have notice of the pending action long before the default judgment was entered against the principal defendants. It was notified of the accident and received a notice of a suit being started by Attorney Barbara Robb on or about June 13, 1969, on behalf of two other plaintiffs, Haddie and Walter Clark. The attorney for the plaintiffs sent a letter in August, 1969, to the garnishee notifying it of plaintiffs' claims. The original complaint in the instant suit was not filed until August 11, 1970. C. R. Carlson of the Motor Vehicle Accident Claims Fund, testified that he was in contact with the garnishee's attorney concerning the claims of plaintiffs by January, 1971. Default judgment was not entered in the instant case until March 24, 1972.

Richard Haskins, the attorney for the garnishee, admitted to knowledge of the companion case started by Attorney Robb, but indicated he had no personal knowledge and had not received notice of the commencement of a lawsuit by the named insured, or the driver, Louis Scott. Attorney Haskins did locate Louis Scott in Jackson Prison, however, and wrote to him on July 2, 1969. He requested Scott to send to the garnishee the summons and complaint that Scott received while he was in the county jail. In the letter, Haskins mentioned the accident which occurred on August 15, 1968.

The evidence presented establishes that the garnishee had notice and actual knowledge of the case long before the default judgment was entered against the defendant.

The garnishee has failed to establish its burden that it was prejudiced by the lack of notice directly from the insured. The failure of the insured to notify the garnishee, absent a showing of prejudice, is not a valid defense by the insurance company for liability on the judgment entered against the insured. *See generally Bibb* v *Dairyland Insurance Co,* 44 Mich App 440

(1973), *Wendel* v *Swanberg*, 384 Mich 468 (1971), *Weller* v *Cummins*, 330 Mich 286 (1951).

The garnishee next argues that the trial court erred in allowing substituted service on the principal defendants.

In their motion for substituted service, plaintiffs claimed that attempts to serve defendants personally had failed. Plaintiffs stated that Fanny Mae Davis's last known address was in Clarksville, Tennessee; Louis Scott was out of prison on parole and had not reported to his parole officer for a long period of time and his residence was unknown; the whereabouts of Paul Hines and Willie Davis were unknown. The plaintiffs said they had made diligent attempts through members of their counsel's office staff and outside investigative agencies to locate the defendants, but had been unable to do so. As a result, an order for substituted service was entered by the trial court. The order stated:

> "It is hereby ordered that defendant, Fanny Mae Davis, be served through registered mail at her last known address, and that service also be made through the Detroit Legal News by publishing in the Detroit Legal News once a week for a period of five weeks naming defendants Fanny Mae Davis, Louis Scott, Willie Davis and Paul Hines, giving said defendants notice of this cause of action."

Defendants have disappeared with knowledge that plaintiffs had been injured and might have a possible claim against them. Where service of process cannot reasonably be made in the manner provided for under other rules, the court may, in its discretion, allow service of process to be made upon a defendant in any other manner which is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. GCR 1963, 105.8, *Krueger* v *Williams*, 71 Mich

App 638 (1976), *aff'd on rehearing*, 75 Mich App 1 (1977). The evidence indicates that defendants have purposefully concealed their whereabouts. The garnishee should not be able to rely on defendants' own self-inflicted disappearance to avoid liability, particularly when the garnishee is the only truly interested party and the defendants are apparently totally disinterested, the judgments being within policy limits. The garnishee is the party actually paying the judgment, not the defendants. To allow the garnishee to benefit from defendants' disinterest in the case would be to leave the injured plaintiffs without redress if they were unable to personally serve unstable, immune, or irresponsible defendants. *Cf.* dicta on service of process in a divorce proceeding in *Pennoyer* v *Neff*, 95 US 714, 734-735; S Ct ; 24 L Ed 565, 573 (1877), *cited in Shaffer* v *Heitner*, US ; S Ct ; 53 L Ed 2d 683, 696 (1977).[1] We find no abuse of discretion by the trial court in allowing substituted service on the principal defendants. GCR 1963, 105.8.

But the trial court did err in not requiring strict compliance with the requirements of service by registered mail on Fanny Mae Davis, who was reportedly residing in Tennessee. There is no indication that a return receipt of the registered mail was made a part of the record. MCLA 257.403; MSA 9.2103. *Tomkiw* v *Sauceda*, 374 Mich 381 (1965). Service on Fanny Mae Davis was not properly accomplished, and the court did not acquire jurisdiction over her.

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[1] The *Shaffer* court stated in a footnote:

"It would not be fruitful for us to reexamine the facts of cases decided on the rationales of *Pennoyer* and *Harris* to determine whether jurisdiction might have been sustained under the standard we adopt today. To the extent that prior decisions are inconsistent with this standard, they are overruled." 53 L Ed 2d at 703 n39.

The default judgment against Fanny Mae Davis is vacated. The default judgment against defendants Willie Davis, Louis Scott, and Paul Hines, and the garnishment judgment against DAIIE are affirmed.

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Southfield, on the Seventeenth day of July in the year of our Lord one thousand nine hundred and seventy-eight.

Present the Honorable MICHAEL J. KELLY, Presiding Judge, THOMAS M. BURNS, RICHARD M. MAHER, Judges.

ROBERT RODGERS AND
JOHNNY HAMPTON,
Plaintiffs-Appellees,

v

FANNY MAE DAVIS, WILLIE DAVIS, LOUIS SCOTT, PAUL HINES and RICHARD H. AUSTIN, Secretary of State, State of Michigan, Director of the Motor Vehicle Accident Claims Fund,
Defendants-Appellees,

Docket No. 77-1107

L.Ct. #70-162825

v

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE,
Garnishee Defendant
-Appellant.

Order Granting Leave to Appeal

In this cause an application for rehearing is filed by appellant and an answer in opposition thereto having been received, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application for rehearing filed by appellant be, and the same is hereby DENIED.

STATE OF MICHIGAN — ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 18th day of July in the year of our Lord one thousand nine hundred and seventy-eight.

/s/ RONALD L. DZIERBICKI
Clerk

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 19th day of July in the year of our Lord one thousand nine hundred and seventy-nine.

Present the Honorable MARY S. COLEMAN, Chief Justice, THOMAS GILES KAVANAUGH, G. MENNEN WILLIAMS, CHARLES L. LEVIN, JOHN W. FITZGERALD, JAMES L. RYAN, BLAIR MOODY, JR., Associate Justices

CR 24-130

ROBERT RODGERS AND
JOHNNY HAMPTON,
Plaintiffs-Appellees,

v

FANNY MAE DAVIS, WILLIE DAVIS, LOUIS SCOTT, PAUL HINES, and SECRETARY OF STATE, STATE OF MICHIGAN, DIRECTOR OF MOTOR VEHICLE ACCIDENT CLAIMS FUND,
Defendants-Appellees,

v

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE,
Garnishee Defendant
-Appellant.

61861

COA:
77-1107

LC:
162-825

On order of the Court, the application for leave to appeal is considered, and it is GRANTED. The parties are directed to include among the issues to be briefed (1) whether the trial court erred in considering the prerequisites for substituted service when personal jurisdiction was required by not requiring an appropriate affidavit in support thereof to show diligent inquiry; and (2) whether the trial court erred in finding that GCR 1963, 105.8, authorizes service of process by publication to obtain personal jurisdiction as a means reasonably calculated to give actual notice of the proceedings and an opportunity to be heard.

It is further ORDERED that this case be argued and submitted to the Court together with the cases of *Krueger* v *Williams* (Docket No. 59743) and *Moyer* v *Lott* (Docket No. 62177), one immediately following the other.

The clerk is directed to place this case on the January 1980 session calendar. The briefs and appendixes of the parties are to be filed and served in the manner provided by GCR 1963, 857, but the appellant's brief and appendix must be filed and served by September 28, 1979, and the appellees' brief, and appendix if necessary, by December 14, 1979.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 19th day of July in the year of our Lord one thousand nine hundred and seventy-nine.

/s/ Corbin R. Davis, Deputy Clerk.

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 3rd day of August in the year of our Lord one thousand nine hundred and seventy-nine.

Present the Honorable MARY S. COLEMAN, Chief Justice, THOMAS GILES KAVANAGH, G. MENNEN WIL-

LIAMS, CHARLES L. LEVIN, JOHN W. FITZGERALD, JAMES L. RYAN, BLAIR MOODY, JR., Associate Justices

ROBERT RODGERS AND
JOHNNY HAMPTON,
Plaintiffs-Appellees,

v

FANNY MAE DAVIS, WILLIE DAVIS, LOUIS SCOTT, PAUL HINES, and SECRETARY OF STATE, STATE OF MICHIGAN, DIRECTOR OF MOTOR VEHICLE ACCIDENT CLAIMS FUND,
Defendants-Appellees,

61861
CoA: 77-1107
LC: 162-825

v

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE,
Garnishee Defendant
-Appellant.

AMENDMENT TO ORDER

On order of the Court, the order of July 19, 1979 is hereby amended to correct a clerical error in the filing deadlines set forth therein by correcting the third paragraph of the text thereof to read as follows:

The Clerk is directed to place this case on the January 1980 session calendar. The briefs and appendixes of the parties are to be filed and served in the manner provided by GCR 1963, 857, but the appellant's brief and appendix must be filed and

served by October 8, 1979, and the appellees' brief, and appendix if necessary, by December 3, 1979.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 3rd day of August in the year of our Lord one thousand nine hundred and seventy-nine.

/s/ Corbin R. Davis, Deputy Clerk.

(Filed February 3, 1981)

STATE OF MICHIGAN
SUPREME COURT

ESTHER V. KRUEGER,
Plaintiff-Appellant,

v

No. 59743

ALICE J. WILLIAMS,
Defendant-Appellee.

ROBERT RODGERS AND
JOHNNY HAMPTON,
Plaintiffs-Appellees,

v

FANNY MAE DAVIS, WILLIE DAVIS, LOUIS SCOTT, PAUL HINES and SECRETARY OF STATE, STATE OF MICHIGAN, DIRECTOR OF MOTOR VEHICLE ACCIDENT CLAIMS FUND,
Defendants-Appellees,

No. 61861

v

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE,
Garnishee Defendant-Appellant.

BEFORE THE ENTIRE BENCH

FITZGERALD, J.

We are asked to construe GCR 1963, 105.8. In the *Krueger* case, we must decide whether the rule will permit substituted service of process upon a defendant's liability insurer. In the *Rodgers* case, we must determine if this rule authorizes service of process by publication to obtain personal jurisdiction over a defendant.

I

In *Krueger* v *Williams*, plaintiff and defendant were involved in an automobile accident. At the time, both parties were insured by the Detroit Automobile Inter-Insurance Exchange (hereafter DAIIE). Plaintiff attempted to negotiate a settlement with DAIIE. When resolution became impossible, approximately six months before the statute of limitations was to run, plaintiff filed suit against Alice Williams, who at the time of the accident was apparently a resident of Grand Rapids.

After the complaint was filed, plaintiff tried to locate the defendant. An investigator was hired but all attempts to find Alice Williams were unsuccessful.

Four months after the complaint was filed, a copy of the summons and complaint were sent by registered mail, return receipt requested, to the defendant's last known address in Arkansas. These were returned unopened with the notation "Moved — left no address." Copies were also served upon the Secretary of State, Non-Resident Section, and defendant's liability insurance carrier. The summons, complaint, affidavit and proof of service were mailed to the DAIIE office in Grand Rapids. The attorney for the insurance company entered a special appearance, challenging the circuit court's jurisdiction since no personal service was made on Alice Williams.

Plaintiff then filed a motion pursuant to GCR 1963, 105.8, to allow substituted service upon defendant by service of process on the liability carrier. Following hearings on the motion, this form of substituted service was denied. The circuit court also granted defendant's application for a writ of mandamus dismissing the cause of action. The Court of Appeals agreed that the method of substituted service was inadequate. We granted leave to appeal, directing the parties to address the issue of whether the trial court erred by refusing to allow plaintiff substituted service of process upon the defendant's liability insurer.

In *Rodgers,* plaintiffs were passengers on a city bus when a police car chasing a vehicle went through a stop sign and collided with the bus. The plaintiffs sustained injuries and filed a complaint naming various officials as defendants and alleging that the driver and/or owner of the car was unknown. After the plaintiffs learned that the owners of the automobile were Fanny Mae and Willie Davis, and that the driver was either Louis Scott or Paul Hines, a motion was made and granted to amend the complaint and add these four persons as defendants. Shortly thereafter, plaintiffs filed a motion for substituted service by mail and publication stating that following diligent attempts by their office staff and outside investigative agencies, they had been unable to locate the added defendants.[1] This motion was granted.[2] The added defendants failed to appear and a default judgment was entered against Fanny Mae Davis, Willie Davis, Louis Scott and Paul Hines.

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[1] Fanny Mae Davis' last known address was in Clarksville, Tennessee. Louis Scott was on parole at the time to the Michigan State Department of Corrections; however, he hadn't reported to his parole

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Plaintiffs then filed an affidavit for garnishment against the Detroit Automobile Inter-Insurance Exchange which had a policy of insurance in effect on the named insured Willie Davis and on Louis Scott. DAIIE moved to vacate the default and dismiss the garnishment on the grounds that personal jurisdiction was never obtained over the principal added defendants and that the order for substituted service was improperly granted because it was not calculated to give actual notice of the proceedings. This motion was denied.

The trial of garnishee liability resulted in judgment for the plaintiffs. The court found that the insurance company had adequate notice of the case well before the default judgment was taken and had failed to sustain the burden of proving that it was prejudiced. The Court of Appeals affirmed in an unpublished per curiam opinion.[3] Rehearing in the Court of Appeals was denied. We granted leave to appeal, directing the parties to include among the issues to be briefed whether the trial court erred in finding that GCR 1963, 105.8, authorizes service of process by publication to obtain personal jurisdiction as a means reasonably calculated to give actual notice of the proceedings and an opportunity to be heard and whether the trial court, when considering the prerequisites for substituted service when personal jurisdiction is required, erred by not requiring an appropriate affidavit in support to show diligent inquiry.

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officer for a substantial period of time, and his parole officer did not know his current whereabouts. Plaintiffs had no knowledge of the whereabouts of defendants Hines and Willie Davis.

[3] Letters were sent by registered mail to Fanny Mae Davis' last known address. A notice was published in the *Detroit Legal News* once a week for five weeks naming all defendants involved in this cause of action.

(continued on next page)

II

GCR 1963, 105.8 reads:

"Discretion of the Court. The court in which an action has been commenced may, in its discretion, allow service of process to be made upon a defendant in any other manner which is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard, if an order permitting such service is entered before service of process is made upon showing to the court that service of process cannot reasonably be made in the manner provided for under other rules."

Service of process is defined as:

"[T]he giving of such actual or constructive notice of a suit or other legal proceeding to defendant as makes him a party thereto, and compels him to appear or suffer judgment by default; and 'service' in this connection means the execution of process or the particular act of the officer by which the copy of the citation was communicated." 72 CJS, Process, § 25, pp 1022-1023.

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[3] The Court of Appeals agreed that DAIIE had adequate notice of the pending action sufficiently before the default judgment was entered. In regard to the substituted service by mail and publication, the court noted that the evidence indicated that the added defendants had purposefully concealed their whereabouts. In such a situation it would be unfair to allow the garnishee to escape liability when the judgments are within the policy limits and the garnishee is the truly interested party. Thus, service under GCR 1963, 105.8, was appropriate. The court held, however, that service on Fanny Mae Davis was not proper since there was no evidence that a return receipt of the registered mail was made a part of the record as required by statute. MCL 257.403; MSA 9.2103. Thus, judgment against Fanny Mae Davis was vacated. The default judgment against Willie Davis, Louis Scott and Paul Hines was affirmed, as was the judgment of garnishment against DAIIE.

Service may be made personally on a defendant or, if this is not possible, constructive service is permitted. Our court rules provide various methods to achieve substituted service. The Legislature has recognized that these rules must be drawn so as to be applicable to a wide variety of facts. The inherent limit is the requirement that the means chosen be reasonably expected to give notice of the pendency of the action. GCR 1963, 105.8, recognizes this by allowing service in any manner as long as it can be shown to the court that other, more traditional, modes are unavailable.

The committee notes to rule 105.8 read:

> "This provision is included to give the court discretion to allow service of process to be made in a manner which satisfies the language of *Milliken* v *Meyer*, 311 US 457; 61 S Ct 339; 85 L Ed 278; 132 ALR 1357 [1940], rehearing denied 312 US 712; 61 S Ct 548; 85 L Ed 1143 [1941], *i.e.*, a method 'reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard.'
>
> "The state of the law seldom remains static for very long, and particularly in the field of service of process, change has been occurring rapidly.*** It is thus believed desirable to confer discretion upon the courts to permit utilization of new methods of service of process which may be developed, and to permit courts themselves to propose and effectuate other methods of service of process, so long as the methods meet the requirements of the due process clause of the 14th Amendment to the United States Constitution, and the equivalent clause in the Michigan constitution." 1 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), pp 111-112.

Traditionally, service of process was integrally linked with jurisdiction and the power of a court to render a binding decision. See *Pennoyer* v *Neff*, 95 US 714; 24 L Ed 565 (1877).

This "power concept" has been substantially altered by the United States Supreme Court decision in *Shaffer* v *Heitner*, 433 US 186; 97 S Ct 2569; 53 L Ed 2d 683 (1977). Jurisdiction and notice may now be viewed as two separate aspects of one due-process guarantee. *Shaffer* addressed itself to the jurisdiction question, reaffirming the basic requirements set out in *International Shoe Co* v *Washington*, 326 US 310; 66 S Ct 154; 90 L Ed 95 (1945). To assert jurisdiction sufficient minimum contacts must exist between the forum, the defendant and the subject matter of the litigation so as not to offend traditional notions of fair play and justice.

The notice component, equally fundamental to any due process analysis, but with its own distinct requirements, is guided by the reasoning set forth in *Mullane* v *Central Hanover Bank & Trust Co*, 339 US 306; 70 S Ct 652; 94 L Ed 865 (1950). See also Lacy, *Personal Jurisdiction and Service of Summons After Shaffer* v *Heitner*, 57 Oregon L Rev 505, 506-511 (1978).

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane, supra*, p 313.

The requirement of notice so as to afford an opportunity to be heard is clearly the heart of GCR 105.8. The rule adopts a liberal approach to service of process which recognizes the mobility of contemporary society and the state's interest in providing recompense for injured plaintiffs. The court is given the discretion to implement any method for service of process beyond those set out in other rules when it is shown that in the context of a given situation other methods are not reasonable. This omnibus rule is meant to allow flexibility, and as long as the means chosen meet *Mullane's* standards,

service will be allowed. See *Conrad* v *Ward*, 33 Mich App 687, 690; 190 NW2d 361 (1971); *Felix* v *Felix*, 47 Mich App 744; 209 NW2d 871 (1973).

It is important to note that *Mullane* acknowledged the possibility that the means chosen would never reach the defendant.

> "[I]t has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Mullane, supra*, p. 317.

This language reflects an awareness that there may be situations in which an injured plaintiff will not be denied a cause of action even though a defendant cannot be found. Similarly, the broad scope of GCR 1963, 105.8, offers an injured plaintiff the possibility of fashioning a method of service which will serve to permit an action to proceed. The rule recognizes that substituted service in an extraordinary case is not an automatic right. After consideration of all the relevant circumstances of the individual case, it is the court that must make an independent evaluation regarding available alternative methods of service consistent with the guarantees of due process. As long as the means are "reasonably calculated" to reach the defendant, the requirement of actual notice is satisfied and service will be sustained. We are reminded of the frequently quoted words of Justice Holmes, "Now and then an extraordinary case may turn up, but constitutional law like other mortal contrivances has to take some chances, and in the great majority of instances, no doubt justice will be done." *Blinn* v *Nelson*, 222 US 1, 7; 32 S Ct 1; 56 L Ed 65 (1911).

III

The arguments in the *Krueger* case involve two issues: 1) will service of process upon a defendant's liability insurer comport with the guarantees of due process of law and enable our courts to exercise jurisdiction, and 2) did the lower courts err by not allowing plaintiff to use some method of substituted service of process to serve an absent defendant.

We conclude that jurisdiction was proper in Michigan courts and that litigation here does not offend the due process rights of defendants. Defendant Williams argues:

> "The landmark case of *Pennoyer* v *Neff* [*supra*] declared that, to have a determination of personal liability of the defendant, he must be brought within the jurisdiction of the court by service of process within the state, or by his voluntary appearance.*** In other words, while the court might have jurisdiction over the subject matter, it would not have jurisdiction over the defendant unless he was personally served with process within the state."

We rely again on the United States Supreme Court's recent decision of *Shaffer* v *Heitner*, in which the Court said, "*Pennoyer* itself recognized that its rigid categories*** could not accommodate some necessary litigation." *Shaffer*, *supra*, p 201. Cases involving automobile accidents comprised one such category.

> "The advent of automobiles, with the concomitant increase in the incidence of individuals causing injury in States where they were not subject to *in personam* actions under *Pennoyer*, required further moderation of the territorial limits on jurisdictional power. This modification, like the accommodation to the realities of interstate corporate activities, was accomplished by use of a legal

fiction that left the conceptual structure established in *Pennoyer* theoretically unaltered." *Shaffer, supra,* p 202.

Thus, under *Pennoyer,* service could be made on an in-state resident as the basis of in personam jurisdiction and, by using the legal fiction that the out-of-state motorist appointed a state official to act as his agent and accept process, in personam jurisdiction was also possible for the non-resident driver.

International Shoe Co v *Washington, supra,* acknowledged this use of legal fictions and announced that the ancient concept of in personam jurisdiction based on the court's power over the defendant was no longer the proper focus of inquiry. Rather, courts were to evaluate the contacts that existed between the defendant and the forum and if sufficient contacts were shown to exist, jurisdiction could be maintained. The standard to be used was one of reasonableness under all of the circumstances; no mechanical formulas could determine whether or not due process was satisfied. The *Shaffer* Court said, "Thus, the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction." *Shaffer, supra,* p 204.

Our courts have utilized this minimum contact approach. See *Parish* v *Mertes,* 84 Mich App 336; 269 NW2d 591 (1978); *Cole* v *Doe,* 77 Mich App 138; 258 NW2d 165 (1977). The language of our court rules reflects these concepts. GCR 1963, 105.9, Personal Jurisdiction, speaks of the contacts, ties and relations between the defendant and the state as the tests to determine whether our courts may assert personal jurisdiction. In *Schneider* v *Linkfield,* 40 Mich App 131; 198 NW2d 834 (1972), *aff'd* 389 Mich 608; 209 NW2d 225 (1973), the Court of Appeals, addressing the jurisdiction issue and not the validity of service, said, "We see nothing unfair about allowing a

plaintiff to sue in Michigan a defendant who was a resident of the jurisdiction at the time the cause of action arose." In *Schneider*, an automobile accident occurred in Michigan. The defendants were Michigan residents at the time of the accident but had subsequently moved out of state.

Recent United States Supreme Court decisions have questioned the validity of the *Pennoyer* type of reasoning in favor of the dual aspect analysis we have explored in Part II. We conclude that Alice Williams did have sufficient contacts with Michigan to make our courts a proper forum for litigation.

In addressing the issue of substituted service of process, we conclude that the lower courts did err by not allowing, consistent with the provisions of GCR 1963, 105.8, some form of substituted service of process.

Some additional facts are pertinent. On the date of the accident, both parties were insured by DAIIE. Alice Williams was an assigned risk. Thus, though DAIIE did not sell the policy to Mrs. Williams, and while the actual notice of the accident was forwarded by the "Producer of Record" (the producing agent who sold the policy to Alice Williams), DAIIE did have an obligation to the defendant. The parties do state that at one point, albeit early in the history of this case, the defendant did write a letter to the insurance company. Also, plaintiff did attempt to negotiate this claim with a representative of DAIIE. Suit was filed only after these negotiations failed.

Plaintiff attempted service of process by compliance with the non-resident motorist statute, MCL 257.403; MSA 9.2103. Because the letter was returned unopened, this type of service was unavailable. See *Tomkiw* v *Sauceda*, 374 Mich 381; 132 NW2d 125 (1965).

Plaintiff made diligent efforts to locate the defendant. An investigator was hired and various locations checked. Affidavits of two investigators as well as plaintiff's attorney were filed reflecting these efforts. Plaintiff has demonstrated that there were no other means available to her to effect service of process except by appealing to the court, in its discretion, to allow her to serve the defendant's liability insurer.

While the ability to effect service of process in this manner is a new concept for Michigan, we are not without precedent. A unanimous opinion of the highest court of New Jersey has held that consistent with the requirements of due process, service of process on a motorist, insured at the time of the accident but missing at the time of suit, may be made by service on the defendant's liability insurance carrier and notice to the defendant's last known address. *Feuchtbaum* v *Constantini*, 59 NJ 167; 280 A2d 161 (1971).

In *Dobkin* v *Chapman*, 21 NY2d 490; 289 NYS2d 161; 236 NE2d 451 (1968), the New York Court ruled that following an automobile accident when the whereabouts of the defendant is unknown, alternative methods of service of process may be used, including service by ordinary mail or service by mail and service on the insurance carrier. After noting that due process cannot be measured by any rigid formula, the New York Court evaluated four factors before reaching its conclusion. Weighing "the plaintiff's need, the public interest, the reasonableness of the plaintiff's efforts under all the circumstances to inform the defendant, and the availability of other safeguards for the defendant's interests", the Court concluded that the interests of the plaintiffs are paramount.

After considering the same factors, the New Jersey Court wrote:

> "Upon a consideration of all of the interests involved, the balance must be struck in plaintiff's favor. Substituted service should be ordered. We agree that service upon the carrier would be appropriate. By its contract the carrier has the right and the duty to defend any action against the insured. The carrier thus has a representative role, which, though it does not include an express agency to accept service of process, is nonetheless relevant when process cannot otherwise be served upon the insured. Realistically there is more of a chance that defendant will learn of the suit by such service than through available alternatives, for the carrier is likely to have an interest in finding him." *Feuchtbaum, supra,* p. 178.

We agree with these analyses. Plaintiff has made diligent attempts to serve defendant. Plaintiff's need to utilize constructive service in this case is obvious. Our mobile society affords elusive defendants the potential to escape liability by avoiding service of process. The insurance company, while undertaking negotiations to settle this controversy, was aware of the possibility that a suit would be filed. We would allow constructive service under these circumstances.

In *Rodgers,* the second case before us, appellant DAIIE contests both the type of service which was allowed and the manner in which the substituted service was granted. It argues that to premise personal jurisdiction on service of process by publication alone is violative of the constitutional guarantee of a due-process right to notice. Appellant also contends that where personal jurisdiction is necessary, GCR 1963, 105.8, requires an appropriate affidavit of facts show-

ing the diligent inquiry made by plaintiffs to locate defendants.

The method of imparting notice sufficient to pass constitutional muster was discussed by the United States Supreme Court in *Mullane:*

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action* and afford them an opportunity to present their objections.
>
> * * *
>
> "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, *or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.*" (Emphasis added.) (Citations omitted.) *Mullane, supra,* 314-315.

It is evident that due process does not require that actual notice be given in every case. Due process requirements are satisfied if the method of imparting notice is reasonably calculated under all the circumstances to afford notice. When circumstances make it doubtful that actual notice will be effected, the method used may not be substantially less likely to afford notice than other customary substitutes.

Service of process by publication is generally regarded as the method least likely to impart actual notice. However, publication notice is permissible under the Due Process Clause in certain limited situations. As we have quoted, the

Mullane Court recognized that if, for example, the specific whereabouts of a person is unknown, service of process by publication may be the most practicable and adequate method of service available.

Notice must be reasonably calculated to inform interested parties that an action against them is pending, but there is no rigid formula to determine when personal service is required or when constructive service may be utilized. The kind of notice required will, of necessity, vary with the circumstances of each case. See *Walker* v *City of Hutchinson*, 352 US 112; 77 S Ct 200; 1 L Ed 2d 178 (1956).

In a number of cases subsequent to *Mullane*, the Supreme Court was confronted with the issue of whether service of process by publication constituted fair notice to a defendant consistent with due process. It is significant that in every instance where alternate means of giving notice were available which were better calculated to give actual notice, the Court held service of process by publication constitutionally deficient.[4]

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[4] See, *e.g.*, *City of New York* v *New York, N H & H R Co*, 344 US 293, 296; 73 S Ct 299; 97 L Ed 333 (1953), which involved a railroad reorganization proceeding where publication notice to a creditor of the time for filing claims was held insufficient. In *Walker* v *City of Hutchinson*, 352 US 112; 77 S Ct 200; 1 L Ed 2d 178 (1956), publication notice to a landowner of condemnation proceedings was deemed constitutionally deficient where the landowner's name was known to the city and the city failed to present any "compelling or even persuasive reasons why *** direct notice *** [could not] be given." Id, 116.

Similarly, in *Schroeder* v *City of New York*, 371 US 208; 83 S Ct 279; 9 L Ed 2d 255 (1962), publication notice to a landowner whose property rights were affected by diversion of a river was held in-

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The *Hutchinson* Court rejected service of process by publication as an adequate method of imparting notice in that case, stating that "*if feasible,* notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests". (Emphasis added.) *Id.,* 115. Thus, although the United States Supreme Court has not set forth a rigid test as to what showing is required before publication notice is deemed sufficient, the Court has not hesitated to disapprove the use of publication notice where alternative means better calculated to impart actual notice are reasonably available and where resort to these alternate means is not overly burdensome.

Similarly, our Court has held unconstitutional statutory schemes which authorize service by publication as the only required means of imparting notice especially where the identity and whereabouts of parties are readily ascertainable. See *Dow* v *Michigan,* 396 Mich 192; 240 NW2d 450 (1976); *Ridenour* v *Bay County,* 366 Mich 225; 114 NW2d 172 (1962).

GCR 1963, 105.8 was designed to give trial judges freedom to fashion methods of giving notice consistent with due process, where a sufficient showing has been made to justify relieving a party from compliance with methods of service specifically prescribed by court rule or statute. A party seek-

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sufficient. The Court noted that the landowner's name and address were ascertainable from deed records and tax rolls and concluded:

> "The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question." *Schroeder,* 212-213.

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ing such relief must show to the court's satisfaction that the proposed method of service "is reasonably calculated to give him [defendant] actual notice of the proceedings" and that "service of process cannot reasonably be made in the manner provided for under other rules". GCR 1963, 105.8.

A truly diligent search for an absentee defendant is absolutely necessary to supply a fair foundation for and legitimacy to the ordering of substituted service. "[W]hen notice is a person's due, process which is a mere gesture is not due process." *Mullane, supra,* 315.

The verified motion for substituted service presented on behalf of plaintiffs in *Rodgers* is insufficient. It fails to show with particularity either that service of process could not reasonably have been made according to prescribed methods or that no better alternative means of giving notice were available than publication.

The only evidence in the record of plaintiff's efforts to personally serve defendants appears in a conclusory statement contained in plaintiff's motion for substituted service supported by a general affidavit by one of their attorneys that the motion's allegations are "true to the best of his knowledge,

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In other cases concerning the adequacy of notice, the Court has stressed that notice will not be considered reasonable if better means of actually informing a party are available. Thus, in *Covey* v *Town of Somers*, 351 US 141; 76 S Ct 724; 100 L Ed 1021 (1956), the Court held that mailed notice in a foreclosure proceeding was insufficient where the city knew that the party receiving the notice was incompetent and therefore incapable of understanding the meaning of the notice. Also, in *Robinson* v *Hanrahan*, 409 US 38; 93 S Ct 30; 34 L Ed 2d 47 (1972), notice was held insufficient where notice was mailed to defendant's home address and the state knew that defendant was no longer at that address but was incarcerated.

except those matters therein stated to be on information and belief, and as to those matters he believes the same to be true". In short, there is no direct sworn testimony.[5]

The motion first asserts that personal service on defendants "is not possible". It then states the last known address of one defendant and that the whereabouts of the other defendants are "unknown". The motion further alleges that despite "diligent attempts" by office staff and investigative agencies, plaintiffs have been unable to locate defendants. In short, the pleadings contain insufficient factual assertions as to what diligent attempts were undertaken to find and serve defendants under other rules. Further, the pleadings offer no explanation as to why other means better calculated to impart actual notice than publication were not reasonably available.

While it may very well be that the unnamed members of the office staff and the anonymous outside investigative agencies did everything necessary to constitute an effective good-faith effort under GCR 1963, 105.8, from the record before us we just do not know. As stated in *Thompson* v *Shiawassee Circuit Judge*, 54 Mich 236, 237; 19 NW 967 (1884):

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[5] Such testimony as there is is contained in the following three paragraphs:

"1. Plaintiffs petition this Honorable Court to serve the defendants, Fanny Mae Davis, Willie Davis, Louis Scott and Paul Hines by substituted service to their last known addresses as may be reasonably determined by plaintiffs for the reason that plaintiffs have sought to serve defendants, Fanny Mae Davis, Louis Scott, Willie Davis and Paul Hines personally, but same is not possible.

"2. That plaintiffs verily believe that Fanny Mae Davis' last known address has been 705 Dixon Street, Clarksville, Ten-

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> "The affidavit should state the facts of inquiry and investigation, so that the court can see that the conclusion that the party cannot be found for the reason stated is a reasonable one upon such facts."

The plaintiffs bear this burden so that the trial judge and appellate bench may make an informed and reasonable determination.

The nature and extent of efforts to locate and notify parties under normal methods of service, sufficient to justify the ordering of substituted service under Rule 105.8, will vary according to the circumstances presented in each case. However, the efforts required should be evaluated at least in part according to the type of substituted service proposed by the party seeking relief.

In this case, the plaintiffs requested substituted service by publication and mailing to one defendant's last known address. Under this rule, the use of publication as a notice-giving device should be limited to discrete circumstances where a strong specific factual showing is made that notice cannot reasonably be effectuated in the manner provided under other rules and that means which are better calculated to give notice than publication are not reasonably available or feasible.

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nessee; and, defendant, Louis Scott is presently on parole to the Michigan State Department of Corrections, but has not reported to his parole officer for a long period of time, and his present whereabouts are unknown to his parole officer, and, defendants Paul Hines and Willie Davis' whereabouts are totally unknown to plaintiffs.

"3. That plaintiffs have made diligent attempts through members of their office staff and outside investigative agencies to locate the defendants, but has [sic] been unable to do so."

Therefore, we remand the *Rodgers* case to the trial court so that plaintiffs may be permitted to show that they did indeed satisfy the requirements of GCR 1963, 105.8. If plaintiffs can demonstrate to the trial judge's satisfaction that, prior to the time substituted service was originally ordered, they had exercised due diligence to locate defendants but were unable to serve them under other rules and that means better calculated to give actual notice than publication were not feasible, the judgments of the trial court and the Court of Appeals shall be affirmed. If plaintiffs are unable to make such a showing, we would reverse and require the trial court to enter an appropriate order of dismissal.

Krueger is reversed and remanded for further proceedings in accordance with this opinion.

/s/ JOHN W. FITZGERALD
/s/ BLAIR MOODY JR.
/s/ CHARLES L. LEVIN
/s/ G. MENNEN WILLIAMS

STATE OF MICHIGAN
SUPREME COURT

ESTHER V. KRUEGER,
Plaintiff-Appellant,

v No. 59743

ALICE J. WILLIAMS,
Defendant-Appellee.

ROBERT RODGERS AND
JOHNNY HAMPTON,
Plaintiffs-Appellees,

v No. 61861

FANNY MAE DAVIS, WILLIE DAVIS, LOUIS SCOTT, PAUL HINES and SECRETARY OF STATE, STATE OF MICHIGAN, DIRECTOR OF MOTOR VEHICLE ACCIDENT CLAIMS FUND,
Defendants-Appellees,

v

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE,
Garnishee Defendant-Appellant.

BEFORE THE ENTIRE BENCH

RYAN, J. *(dissenting* in *Krueger; concurring* in *Rodgers)*

Krueger

I dissent from the opinion of the Court in *Krueger* because I am not persuaded that the trial court abused its discretion in refusing to permit the particular substituted service requested by the plaintiff-appellant.

Our court rule is explicit. GCR 1963, 105.8 provides:

> "The court in which an action has been commenced may, in its discretion, allow service of process to be made upon a defendant in any other manner which is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard, if an order permitting such service is entered before service of process is made upon showing to the court that service of process cannot reasonably be made in the manner provided for under other rules."

While minimum due process standards might be satisfied in a given case by service of process upon a liability insurance carrier, it is for the trial judge to determine, in the exercise of his discretion, on a case-by-case basis whether a specifically proposed "other manner" of service "is reasonably calculated to give *** actual notice ***." Here, the trial judge was informed that the insurance company had received no premium payments and had no contact with the insured for almost three years. He also knew that the plaintiff's letter to the defendant's last known address had been returned unopened and that the best efforts of two investigators failed to locate the defendant. Certainly in the face of those facts the trial judge committed no abuse of discretion in concluding that service upon the insurance carrier was not "reasonably calculated to give [defendant] actual notice" of the lawsuit.

By the adoption of GCR 1963, 105.8, this Court determined that the minimal due process requirements of notice of the

pendency of a civil lawsuit would not be the standard in Michigan. Rather, for us, the right to obtain service of process in a manner other than that "provided for under other rules" was made dependent upon the judgment of the trial court in the exercise of its discretion that such "other manner" is reasonably calculated in a given case to give "actual notice" of the pendency of the proceedings.

In my view the trial judge in this case did not abuse his discretion in declining to approve the service upon the liability insurance carrier, given the facts with which he was presented.

Rodgers

I concur in the reasoning and conclusion of my colleagues in the majority with respect to *Rodgers*.

/s/ JAMES L. RYAN
/s/ THOMAS GILES KAVANAGH
/s/ MARY S. COLEMAN

Notice of Appeal to The Supreme Court of The United States

STATE OF MICHIGAN
IN THE SUPREME COURT

ROBERT RODGERS AND
JOHNNY HAMPTON,
Plaintiffs-Appellees,

-v-

FANIE MAE DAVIS, WILLIE DAVIS, LOUIS SCOTT, PAUL HINES and SECRETARY OF STATE, STATE OF MICHIGAN, DIRECTOR OF MOTOR VEHICLE ACCIDENT CLAIMS FUND,
Defendants-Appellees,

-v-

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE,
Garnishee Defendant-Appellant.

Supreme Court No. 61861
Court of Appeals No. 77-1107
Lower Court No. 70 162 185

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Detroit Automobile Inter-Insurance Exchange, Garnishee Defendant-Appellant, hereby appeals to the Supreme Court of the United States from the Final Order of the Supreme Court of the State of Michigan, construing GCR 1963, 105.8 as authorizing service of process by publication alone to obtain personal jurisdiction over a defendant and sustaining the validity of that Court

Rule against a challenge premised upon the Fourteenth Amendment to the United States Constitution, entered February 3, 1981.

This Appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph (2).

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DATED: March 20, 1981

STATE OF MICHIGAN
IN THE SUPREME COURT

ROBERT RODGERS AND
JOHNNY HAMPTON
Plaintiffs-Appellees,

-v-

FANNY MAE DAVIS, WILLIE DAVIS, LOUIS SCOTT, PAUL HINES and SECRETARY OF STATE, STATE OF MICHIGAN, DIRECTOR OF MOTOR VEHICLE ACCIDENT CLAIMS FUND,
Defendants-Appellees,

-v-

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE,
Garnishee Defendant-Appellant.

Supreme Court No. 61861
Court of Appeals No. 77-1107
Lower Court No. 70 162 185

PROOF OF SERVICE

STATE OF MICHIGAN
SS:
COUNTY OF WAYNE

PATRICIA MARIE MCLAUGHLIN, being first duly sworn, deposes and says that on the 20th day of March, 1981,

she mailed copies of the Notice of Appeal to the Supreme Court of the United States and Proof of Service, to:

Robert Gittleman, Esq.
GITTLEMAN &
PASKEL, P.C.
21700 Northwestern Hwy.
Suite 660
Southfield, MI 48075

Regina Ann King, Esq.
ASSISTANT ATTORNEY
GENERAL
Michigan Department of State
MVACF Legal
3222 South Logan Street
Lansing, MI 48910

Clerk of the Court
Circuit Court for the County of Wayne
City-County Building
Detroit, MI 48226

by placing same in the United States Mail, postage prepaid, and properly addressed.

/s/ PATRICIA MARIE MCLAUGHLIN

Subscribed and sworn to before me this 20th day of March; 1981.
/s/ CARL L. GROMEK
Notary Public, Wayne County, Michigan
My Commission Expires: 2-5-84

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE

ROBERT RODGERS AND
JOHNNY HAMPTON,
Plaintiffs,

-v-

FANNIE MAE DAVIS, WILLIE DAVIS, LOUIS SCOTT, AND SECRETARY OF STATE, STATE OF MICHIGAN, DIRECTOR OF MOTOR VEHICLE ACCIDENT CLAIMS FUND,
Defendants,

Civil Action
No. 70 162 185

-v-

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE,
Garnishee-Defendant.

ORDER STAYING PROCEEDINGS PENDING APPEAL

AT A SESSION OF SAID COURT, Held in the City-County Bldg., in the City of Detroit, Wayne County, Michigan, on March 27, 1981.

PRESENT: HONORABLE THOMAS J. FOLEY, CIRCUIT COURT JUDGE.

Garnishee-Defendant, Detroit Automobile Inter-Insurance Exchange, having filed a Notice of Appeal to the Supreme Court of the United States from the February 3, 1981 decision of the Michigan Supreme Court in the above-captioned matter, and having moved for a Stay of Proceedings pending such Appeal with the submission of an Appeal Bond, and it appearing that said Bond is in all respects proper and adequate;

IT IS HEREBY ORDERED that the Appeal Bond be and the same is hereby approved, both as to the sufficiency of the surety thereon and the sum for which the Bond is given.

IT IS FURTHER ORDERED that all proceedings in the above-captioned matter, including any proceedings for enforcement of the Judgment previously entered herein, shall be, and the same are, hereby stayed pending disposition of the said Appeal or the further Order of this Court or the Supreme Court of the United States.

/s/ THOMAS J. FOLEY
CIRCUIT COURT JUDGE

SURVEY OF THE STATES: SERVICE OF PROCESS BY PUBLICATION

This survey lists each State's statute or court rule pertaining to service of process by publication, along with case authority, if available, construing the statute or court rule.

I. Notice by publication does not sustain a personal judgment.

Ariz. R. Civ. P. 4(e) (3); *O'Leary v. Superior Court of Gila County,* 104 Ariz. 308, 452 P.2d 101, 105 (1979).

Colo. R. Civ. P. 4(g); *Hoff v. Armbruster,* 125 Colo. 324, 244 P.2d 1069, 1072 (1952).

Conn. Gen. Stat. Ann. §52-68 (West Supp. 1980); *Gimbel v. Gimbel,* 147 Conn. 561, 163 A.2d 451, 453 (1960).

Del. Code Ann. tit. 10, §365 (1974); *See Lightburn v. Delaware Power & Light Company,* 52 Del. 415, 158 A.2d 919, 922-23 (1960).

D.C. Code §13-336 (1976); *Buchanan v. National Savings & Trust Co,* 79 U.S. App. D.C. 278, 146 F.2d 13, 14 (1945).

Fla. Stat. Ann. §49.011 (West 1969); *Ake v. Chancey,* 152 Fla. 677, 13 So.2d 6, 9 (1943).

Idaho Code §5-508 (1979); *See Skillern v. Ward,* 79 Idaho 350, 317 P.2d 1050, 1052 (1957).

Ill. Ann. Stat. ch. 110, §14 (Smith-Hurd 1968); *Lain v. John Hancock Mutual Life Insurance Company,* 34 Ill. Dec. 603, 78 Ill. App. 3d 264, 398 N.E.2d 278, 287 (1979).

La. Rev. Stat. Ann. §13:3204 (West 1968); *See Lafayette Insurance Company v. Weiss,* 297 So.2d 681, 683 (La. App. 1974).

SURVEY OF THE STATES:
SERVICE OF PROCESS BY PUBLICATION

Md. R. Civ. P. 105b.l; *Ortman v. Coane,* 181 Md. 596, 31 A.2d 320, 322 (1943).

Mo. R. Civ. P. 54-12; *See Burchett v. Burchett,* 572 S.W. 2d 494, 498 (Mo. App. 1978).

Mont. Code Ann. tit. 25, ch.20, R. 4D(5) (1979).

N.J. R. Civ. P. 4:4-4(i), :4-5; *See DeSena v. Prudential Insurance Company of America,* 117 N.J. Super 235, 284 A.2d 363, 368 (1971).

N.Y. Civ. Prac. Law §§314, 315 (McKinney 1972); *See Dobkin v. Chapman,* 21 N.Y.2d 490, 236 N.E.2d 451, 460 (1968).

N.D. R. Civ. P. 4(e) (1).

N.H. Rev. Stat. Ann. ch. 510, §§4,5,8 (Supp. 1979); *See Hutchins v. Del Rosso,* 116 N.H. 421, 365 A.2d 127, 129 (1976).

R.I. R. Civ. P. 4(g).

Tenn. Code Ann. §§21-1-203,-204 (1980); *Turnblazer v. Smith,* 214 Tenn. 277, 397 S.W.2d 772, 775 (1964).

W.Va. R. Civ. P. 4(e) (1); *See Central Operating Company v. Utility Workers of America,* 491 F.2d 245, 251 (4th Cir. 1974).

Wis. Stat. Ann. §801.12 (West 1977); *Sheehan v. Matthew,* 258 Wis. 606, 46 N.W.2d 752, 754 (1951).

II Notice by publication does not sustain a personal judgment except in the case of a defendant determined to be avoiding service of process.

Ala. R. Civ. P. 4.3.

SURVEY OF THE STATES

SERVICE OF PROCESS BY PUBLICATION

Cal. Civ. Proc. Code 415.50 (West 1973); *Hayes v. Risk*, 255 Cal. App. 2d 613, 64 Cal. Rptr. 36 (1967).

Ga. Code Ann. §81A-104(e) (1) (i) (1977); *Barnes v. Continental Insurance Company*, 231 Ga. 246, 201 S.E.2d 150, 151 (1973), modified, *Melton v. Johnson*, 242 Ga. 400. 249 S.E.2d 82 (1978).

Ind. R. Trial P. §4.13 (Burns 1973); *See Milosavljevic v. Brooks*, 31 Ind. Dec. 563, 55 F.R.D. 543, 549-50 (N.D. Ind. 1972).

Iowa R. Civ. P. 60.

Kan. Stat. Ann. §60-307 (1976); *Cadwallader v. Lehman*, 202 Kan. 738, 451 P.2d 163, 169 (1969).

Minn. R. Civ. P. 4.04; *Curran v. Nash*, 244 Minn. 571, 29 N.W.2d 436, 439-40 (1947).

Neb. Rev. Stat. §25-517 (1943); *Welch v. Ayres*, 43 Neb. 326, 61 N.W.2d 635, 636 (1895).

N.M. R. Civ. P. 4(g); *Clark v. LeBlanc*, 92 N.M. 672, 593 P.2d 1075, 1076 (N.M. 1979).

Ohio Rev. Code Ann. §2703.14 (Page 1954); *See Brown v. Gonzales*, 50 Ohio App. 2d 254, 362 N.E.2d 658, 660 (1975); *But see Rasmussen v. Vance*, 34 Ohio Misc. 87, 293 N.E.2d 114, 120 (C.P. 1973).

Or. Rev. Stat. §§15.120, .130 (1977).

S.C. Code §15-9-710 (1976); *See Carnie v. Carnie*, 252 S.C. 471, 167 S.E.2d 297, 298 (1969).

S.D. Compiled Laws Ann. §15-9-7 to -21.

Wash. Rev. Code Ann. §4.28.100 (1962); *Dobbins v. Beal*, 4 Wash. App. 616, 483 P.2d 874, 877 (1971).

SURVEY OF THE STATES

SERVICE OF PROCESS BY PUBLICATION

III. Notice by publication is sufficient to sustain a personal judgment.

Hawaii Rev. Stat. §§634.23, .36 (1977); *See Manley v. Nelson*, 50 Hawaii 484, 443 P.2d 155, 160 (1968), cert. denied sub nom. *Soska v. Manganaro*, 394 U.S. 573, 89 S. Ct. 1299, 22 L. Ed. 2d 555 (1969).

Mich. Gen. Ct. R. 105.8; *Krueger v. Williams*, 410 Mich 144, 300 N.W.2d 910 (1981).

N.C. Gen. Stat. §1A-1 R.4(j) (9) (Supp. 1979); *Emanuel v. Fellows*, 46 N.C. App. 340, 267 S.E.2d 368, 372 (1980).

IV. Pertinent state statutes and court rules for which no authoritative construction was found.

Alaska R. Civ. P. 4(e).

Ark. R. Civ. P. 4(f).

Ky. R. Civ. P. 4.05.

Me. R. Civ. P. 4(g).

Mass. Ann. Laws ch. 227, §7 (Michie/Law. Co-op Supp. 1980).

Miss. Code Ann. §13-3-19 (1972).

Nev. R. Civ. P. 4(e) (1).

Okla. Stat. Ann. tit. 12, §170.6 (West Supp. 1980-81).

42 Pa. Cons. Stat. Ann. §2079 (Purdon Supp. 1980-81).

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SURVEY OF THE STATES:

SERVICE OF PROCESS BY PUBLICATION

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80-1861

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In the Supreme Court of the United States

OCTOBER TERM, 1980

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE, ET AL., APPELLANTS

VS.

ROBERT RODGERS AND JOHNNY HAMPTON, APPELLEES

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLEES' MOTION TO DISMISS OR AFFIRM

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Pursuant to Rule 16 of the Rules of this Court, Appellees move to dismiss this appeal, or in the alternative, to affirm the judgment of the Michigan Supreme Court because the question raised is so unsubstantial as to not warrant further argument.

STATEMENT OF THE CASE

Appellees rely upon the statement of the case set forth by appellants for purposes of this motion to dismiss or affirm only.

THE DECISION IS NOT FINAL

The opinion of the Michigan Supreme Court in this case upheld a trial court's authority to authorize service of process by publication in order to obtain personal jurisdiction over a missing defendant. The opinion limited the lower court's use of publication to only those circumstances where a sufficient showing had been made that service of process was not possible by any other reasonable means. The court's opinion went on to order the case remanded to the trial court level for further proceedings to show what methods had been employed by plaintiffs to locate the missing defendants.

If on remand, the trial court concludes that the particular steps taken by the plaintiffs were not sufficiently diligent within the meaning of GCR 1963, 105.8, then plaintiffs may raise the further issue of what constitutes due diligence within the meaning of constitutional due process.

The generally held view has been that a judgment of the highest state court remanding a case to a lower court for further proceedings consistent with the judgment of the appellate court is not a final judgment, and cannot be reviewed by this Court. *See Pope v. Atlantic Coastline Rail Co.*, 345 U.S. 379, 73 S.Ct. 749, 97 L.Ed. 1094 (1953).

The authority upon which the appellants rely to convince this Court of finality is *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). The issue in *Cox* which moves this Court to use an exception to the 28 U.S.C. 1257(2) Finality Requirement had as its basis the potential for suppression of the press by a state statute which established criminal and civil sanctions in certain news reporting activities. This Court considered the constitutional issue because of the fear of stifling the press coupled with serious doubt as to the state statute's constitutionality. In the case at

bar the rationale used by the court for resort to use of publication cannot be said to be based upon a statute upon which there exists serious doubt because the order permitting publication was allowed only after all other means of service were exhausted. Further, the potential for harm and abuse by suppression of First Amendment rights and by threat of criminal sanctions is not present here. The potential for abuse of process in publication cases is eliminated by the requirement of close scrutiny by the trial court. The trial court's inquiry of the due diligence shown by plaintiffs in attempting to locate missing defendants would permit use of publication in only the most unusual of circumstances. The serious and profound implications of the statute involved in the *Cox* case are simply not present in the case at bar. To the contrary, a finding of finality on this question would eliminate the opportunity for this Court to determine what due process standards must be met before publication can result in personal jurisdiction over a missing defendant.

THE QUESTION IS UNSUBSTANTIAL

The issue on this appeal cannot be said to raise a substantial constitutional question not previously settled by this Court. GCR 1963, 105.8, the local Michigan court rule at issue here, adopts the constitutional standard originally set forth by this Court in *Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278 (1940), *i.e.*, a method of service "reasonably calculated to give . . . actual notice of the proceedings and an opportunity to be heard." Other important decisions of this Court have established limits to which a particular service of process method may go in obtaining personal jurisdiction. In *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), it was held that due process requires

a certain minimum contact with a state be shown such that "traditional notions of fair play and substantial justice" are not offended. In *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), this Court recognized that resort to publication to obtain personal jurisdiction can sometimes not be avoided. In these situations the trial court must weigh the conflicting rights of both plaintiff and the defendant. The right of a defendant to actual notice and an opportunity to be heard is a right subject to practical limitations. These limitations may vary on a case by case basis. To distill these limitations to specific and narrow principles of law as appellants suggest is impractical and unworkable. Rather, a more reasoned view is to weigh each case by the broad principles set forth by this Court in the *Milliken* and *Mullane* cases. Many state courts in dealing with similar constructive service situations have held that the totality of circumstances must be weighed before a particular method of service would be rejected. In *Dobkin v. Chapman*, 21 N.Y.2d 490, 289 N.Y.S.2d 161, 236 N.E.2d 451 (1968), the New York court set forth several of these factors. They include: (1) protection of the plaintiff's legitimate interest; (2) the state's interest in providing suitable relief; (3) the due diligence applied in attempting to locate the missing defendant; (4) the nature of the incident giving rise to the litigation; (5) the presence of an insurer; (6) the ability of the defendant to appear and set aside a default judgment. These factors are discussed in detail in *Constitutionality of Constructive Service of Process on Missing Defendants*, 48 N.C.L. Rev. 616 (1970). Each of these factors is considered in light of the constitutional mandates of the *Mullane* and *Milliken* cases. Fairness in notice is all that is required and this is not subject to specific rules which should issue out of this Court but must be dealt with on a case by case basis viewing all relevant factors. *See Melton v. Johnson*, 242 Ga. 400, 249 S.E.2d 82 (1978).

It is interesting to note that in appellants' survey of state law, the only case that they have discovered which was diametrically opposed to the Michigan Supreme Court decision was *Barnes v. Continental Insurance Co.*, 231 Ga. 246, 201 S.E.2d 150 (1973). This case was subsequently modified by the *Melton* case to permit resort to publication where it could be shown that the defendant had certain state contact and had notice of the pendency of the litigation. The *Melton* case illustrates the application of the *Dobkin* factors, *i.e.*, a case by case approach. Certainly the facts of the case at bar can be readily applied to the *Dobkin* analysis, *i.e.*, the defendants were notified while in prison of the pendency of other litigation arising out of the accident they caused.

In short the reasoning of the appellants in asking this Court to review the decision of the Michigan Supreme Court is based upon factors which differ with each case presented. An all encompassing pronouncement from this Court would be more likely to confuse and further complicate the delicate balance between the rights of plaintiffs and the rights of defendants. It has been shown there are numerous relevant factors which would compel a trial court to fashion a particular mode of constructive service appropriate to the situation. This scrutiny is limited only by the trial court's adherence to the flexible well reasoned constitutional principles set forth by this Court in *Milliken* and *Mullane*.

CONCLUSION

For the foregoing reasons this appeal should be dismissed or the decision of the Michigan Supreme Court should be affirmed.

Respectfully submitted,

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